

(10)  
No. 94-167-CFX  
Status: GRANTED

Title: Katia Gutierrez de Martinez, Eduardo Martinez  
Puccini and Henny Martinez de Papaiani, Petitioners  
v.  
Dirk A. Lamagno, et al.

Docketed:  
July 25, 1994

Court: United States Court of Appeals for  
the Fourth Circuit

Counsel for petitioner: Rodriguez, Isidoro

Counsel for respondent: Solicitor General, Lamagno, Dirk A.,  
Maloney III, Andrew J.

NOTE: 072794 Consulted Frank re dkt

Entry	Date	Note	Proceedings and Orders
1	Jul 25 1994	G	Petition for writ of certiorari filed.
4	Aug 25 1994		Order extending time to file response to petition until September 26, 1994.
6	Sep 26 1994		Order further extending time to file response to petition until October 24, 1994.
8	Oct 24 1994		Brief of respondent United States filed.
9	Oct 26 1994		REDISTRIBUTED. November 10, 1994 (Page 1)
10	Nov 14 1994		Petition GRANTED. limited to Question 1 presented by the petition. *****
11	Nov 15 1994		Michael K. Kellogg, Esquire, of Washington, D. C., a member of the Bar of this Court, is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
12	Dec 12 1994	*	Record filed. Partial record proceedings United States Court of Appeals for the Fourth Circuit.
13	Dec 13 1994	D	Motion of respondent Dirk A. Lamagno to substitute counsel filed.
15	Dec 13 1994		Joint appendix filed.
16	Dec 13 1994		Brief of petitioners Katia Gutierrez de Martinez, et al. filed.
14	Dec 19 1994	*	Record filed. Original record proceedings United States District Court for the Eastern District of Virginia.
17	Dec 22 1994		Motion of respondent Dirk A. Lamagno to substitute counsel DENIED. without prejudice to the filing of a motion for divided argument.
18	Dec 29 1994	G	Motion of the Solicitor General for divided argument filed.
19	Dec 29 1994		Brief of respondent United States filed.
20	Jan 3 1995	G	Motion of respondent Dirk A. Lamagno for divided argument filed.
21	Jan 17 1995		Motion of the Solicitor General for divided argument GRANTED.
22	Jan 17 1995		Motion of respondent Dirk A. Lamagno for divided argument GRANTED. to be divided as follows: 20 minutes - - amicus curiae in support of judgment below; 10 minutes

No. 94-167-CFX

Entry	Date	Note	Proceedings and Orders
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23	Jan 30 1995		-- respondent Lamagno. SET FOR ARGUMENT WEDNESDAY, MARCH 22, 1995. (1ST CASE).
25	Jan 30 1995		Brief of respondent Dirk Lamagno filed.
26	Feb 1 1995		CIRCULATED.
27	Feb 3 1995	X	Brief amicus curiae of Michael K. Kellog filed.
28	Mar 3 1995	X	Reply brief of petitioners filed.
29	Mar 22 1995		ARGUED.

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①

No.

Supreme Court, U.S.  
FILED

IN THE 94 167 JUL 25 1994

Supreme Court of the United States

OCTOBER TERM, 1993

KATIA GUTIERREZ DE MARTINEZ, EDUARDO  
MARTINEZ PUCCINI, AND HENNY MARTINEZ DE  
PAPAANI,

Petitioners,

v.

DIRK A. LAMAGRO, THE DRUG ENFORCEMENT  
ADMINISTRATION, AND THE UNITED STATES OF  
AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Isidoro Rodriguez, Esq.

Attorney for Petitioners  
Law Offices of Isidoro Rodriguez, P.C.  
Calle 84, No. 56-51  
Barranquilla, Colombia  
(011)57-58-561678/458273

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## QUESTIONS PRESENTED FOR REVIEW

- I. WHERE A CERTIFICATION OF SCOPE OF EMPLOYMENT UNDER 28 U.S.C. § 2679-(d)(1) (WESTFALL ACT) HAS BEEN ISSUED, DO THE INJURED PARTIES IN THE AUTOMOBILE ACCIDENT HAVE A RIGHT TO DE NOVO JUDICIAL REVIEW BY THE DISTRICT COURT TO THE CHALLENGE THAT THE CONDUCT OF THE FEDERAL EMPLOYEE WAS NOT OCCURRING WITHIN THE SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT, AND THEREBY A SUIT AGAINST HIM IN HIS INDIVIDUAL CAPACITY IS PERMITTED?
- II. WHETHER THE INJURED PARTIES IN AN AUTOMOBILE ACCIDENT OCCURRING IN THE REPUBLIC OF COLOMBIA, HAVE A JUDICIALLY ENFORCEABLE RIGHT TO COMPENSATION UNDER 21 U.S.C. § 904?

## LIST OF PARTIES

The parties that have appeared here include those listed on the case caption.

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No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
OCTOBER TERM, 1993  
\_\_\_\_\_

KATIA GUTIERREZ DE MARTINEZ, EDUARDO  
MARTINEZ PUCCINI, AND HENNY MARTINEZ DE  
PAPAIANI,

Petitioners,

v.

DIRK A. LAMAGNO, THE DRUG ENFORCEMENT  
ADMINISTRATION, AND THE UNITED STATES OF  
AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

**CITATIONS TO OPINIONS BELOW**

The April 20, 1993, bench decision  
of the United States District Court for  
the Eastern District of Virginia is

unreported, and is reproduced in the appendix to this petition at App. 1-a.

The opinion of the United States Court of Appeal for the Fourth Circuit issued on April 28, 1994, is unpublished and is reproduced in the appendix to this petition at App. 1-b.

#### STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 28, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

#### STATUTES INVOLVED

##### 21 U.S.C. § 904 Payment of Tort Claims

Notwithstanding section 2680 (k) of Title 28, the Attorney General, in carrying out the functions of the Department of Justice under this subchapter, is authorized to pay tort claims in the manner authorized by section 2672 of Title 28, when such claims arise in a foreign country in connection with the

operation of the Drug Enforcement Administration abroad.

##### 28 U.S.C. § 2679 Exclusiveness of remedy

(d)(1) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attor-

ney General shall conclusively establish scope of office or employment for purposes of removal.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

#### STATEMENT OF THE CASE

##### A. JURISDICTION BELOW

Claims for damages were filed by Mrs. Katia Gutierrez de Martinez, Eduardo Martinez Puccini, and Henny Martinez de Papaiani, (hereinafter "Injured Parties") against Mr. Dirk A. Lamagno (hereinafter "Mr. Lamagno"), in his individual capacity based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(2).

Also the action was filed against the Drug Enforcement Administration

(hereinafter "DEA") and the United States pursuant to 28 U.S.C. § 1346(b).

Appellate jurisdiction was invoked pursuant to 28 U.S.C. § 1291.

##### B. RELEVANT FACTS

Police reports show that on Friday night, at 11:45 p.m. on January 18, 1991, Mr. Lamagno was driving away from his hotel under the influence of alcohol, and in the company of an unidentified female passenger, in a 1987 Silver Blue Ford Bronco, identified by non-diplomatic license plates No. LK 9264.

Police reports further show that Mr. Lamagno failed to stop at a marked intersection at Calle 85, with Kra. 47, in the City of Barranquilla, Colombia; and midway through the intersection, suddenly struck the left side of the new 1990 Renault driven by the Injured Par-

ties. The force of the impact of Mr. Lamagno's armored vehicle totally destroyed the 1990 Renault.

After the collision the Injured Parties were trapped in their totally demolished Renault for 45 minutes in the following conditions: Mrs. Katia Gutierrez de Martinez, the driver, was unconscious, bleeding from facial injuries, and was further immobilized with two severely broken arms; Mr. Eduardo Martinez Puccini, was trapped in the passenger front seat unconscious and suffered bleeding cuts; and Mrs. Henny Martinez de Papaiani, sitting on the right hand side of the back seat was also unconscious.

After the collision neither Mr. Lamagno, nor his unidentified female passenger, left their vehicle to render

assistance to the Injured Parties. Later unknown persons, identifying themselves as representatives of the United States Consulate in Barranquilla, Colombia, arrived and entered into a discussion with local police to permit their taking Mr. Lamagno and the unidentified female passenger from the scene of the accident, and removing and replacing the non-diplomatic license plates No. LK 9264, with diplomatic license plates No. CD0172.

Although the local police permitted both acts requested by said unknown persons, and accident report with the original license number was completed, and they instructed Mr. Lamagno, to appear on January 19, 1991, at 1100 hrs, at the 6th Police Inspection, to give testimony regarding the accident.

The Injured Parties were taken to the emergency ward at "Clinica del Caribe" for treatment. For the purpose of proscribing medication, it was noted by the attending physician that Mrs. Katia Gutierrez de Martinez neither had been drinking alcoholic beverages, nor had taken any medication.

Despite the order to appear on January 19, 1991, and March 7, 1991, Mr. Lamagno was taken out of the Republic of Colombia by DEA, and thus prevented the taking of his testimony to the Municipal Secretary, concerning the accident and his condition.

Based on the above facts, the police found that the accident was caused solely and exclusively due to the gross negligence of the Mr. Lamagno, who ill-

egally entered the intersection at a high rate of speed and was under the influence of alcohol.

On May 8, 1991, in accordance with 21 U.S.C. § 904, and 26 U.S.C. § 2675, an administrative claim was filed.

On May 16, 1991, the DEA notified the Injured Parties of the acceptance of their claim, and in accordance with 26 U.S.C. § 2672, the transferring the administrative claim to the Torts Division, U.S. Department of Justice.

During the next year and a half, in processing the administrative claim of the Injured Parties, the Torts Division, requested and received numerous times from the Injured Parties additional information regarding the traffic accident, and the status of their extensiveness injuries.

Prior to the running of the statute of limitation this action was filed on January 15, 1993.

On March 4, 1993, two years and two months from the date of the accident a one paragraph Certificate of Scope of Employment under 28 U.S.C. § 2679(d)(1), was issued asserting that Mr. Lamagno's actions and condition at the time of the accident fell within his "scope of employment."

On March 5, 1993, without taking any evidence to refute the Injured Parties allegations of Mr. Lamagno's driving under the influence of alcohol, or permitting any challenge to the certification of scope of employment, the District Court entered an ex parte order substituting the United States for Mr. Lamagno based on the Fourth Circuit's

holding Johnson v. Carter, 983 F.2d 1316 (1993).

On April 16, 1993, the district court granted the United States motion for summary judgment, based on the "foreign country exemption" under 28 U.S.C. § 2680(k).

On May 4, 1993, a Notice of Appeal was filed appealing the orders of March 5, and April 16, 1993.

On April 28, 1994, the Fourth Circuit affirmed the district court's holding that the certificate of scope of employment was not subject to judicial review, and that 21 U.S.C. § 904, does not alter the "foreign country exemption."

REASONS FOR GRANTING  
THE WRIT

- I. PRIOR TO ORDERING THE SUBSTITUTION OF THE UNITED STATES FOR MR. LAMAGNO BASED UPON THE CERTIFICATION OF SCOPE OF EMPLOYMENT ISSUED PURSUANT TO 28 U.S.C. § 2679(d)(1), THE DISTRICT COURT MUST PROVIDE A DE NOVO REVIEW TO THE INJURED PARTIES TO THE CHALLENGE THAT MR. LAMAGNO DRIVING UNDER THE INFLUENCE OF ALCOHOL, WAS NOT WITHIN THE SCOPE OF HIS EMPLOYMENT.

After receiving the administrative claim on May 8, 1991, the DEA failed to issue any certification of scope of employment under 28 U.S.C. § 2679.

Thus, based on the holding in Smith v. U.S., 762 F.Supp. 1511, at p. 1513 (D.D.C. 1991), aff'd, 957 F.2d 912 (1992), where the District Court held that, "[o]n no basis would the court conclude that drinking and driving after work hours fell within the scope of . . . employment with the DEA," the Injured

Parties filed a diversity action against Mr. Lamagno in his individual capacity.

Subsequently, twenty-six months after the accident a one paragraph certification of scope of employment was issued on March 4, 1993.

However, at no time did the DEA dispute the allegations in the complaint that Mr. Lamagno was driving recklessly and under the influence of alcohol, after normal office hours in the company of an unidentified woman.

The DEA's only argument was based on the Fourth Court's holding in Johnson v. Carter, 983 F.2d 1316 (1993), in that the certification of employment was conclusive and there is no judicial review of the substitution of the United States for Mr. Lamagno.

Based on Johnson v Carter, the district court entered an ex parte order substituting the United States and dismissing the action against Mr. Lamagno. This order was affirmed by the Fourth Circuit on April 28, 1994.

Because this holding of the Fourth Circuit is in conflict with the holding of nine other United States courts of appeal, and is wrong based on the facts of this action, a petition for writ of certiorari should be issued.

A review of Johnson v Carter, underscores the need for this Court to resolve this conflict between the circuits.

Johnson v Carter, involved an Admiral who was named as defendant in libel and slander suit by base a police officer for an incident when admiral alleg-

edly called officer a "liar," the Fourth Circuit held that a certification by Attorney General that admiral was acting within scope of employment was conclusive under the Federal Employees Liability Reform and Tort Compensation Act.

The Fourth Circuit held that 28 U.S.C. § 2679(d)(2) (hereinafter the "Westfall Act"), was passed by Congress to change the rule set out in the Supreme Court's decision in Westfall v. Erwin, 484 U.S. 292, 108 S.Ct. 580 (1988). In Westfall, this Court held that the judicially created doctrine of official immunity did not provide blanket protection to government employees for torts committed in the scope of their employment.

The Westfall Act grants immunity to the government employee acting within

the scope of their employment by requiring persons injured by them to substitute the government as the defendant.

In its holding, the Fourth Circuit does not accept the claim that since 28 U.S.C. § 2679(d)(1), does not contain the statement contained in 28 U.S.C. § 2679(d)(2), that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal," de novo review of the certification was required by the district court except for removal.

The Fourth Circuit further rejects the legislative history, wherein Congressman Frank, the Act's sponsor, stated that "the plaintiff would still have the right to contest the certification if they [sic] thought the Attorney General were [sic] certifying without jus-

tification." Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, 100th Cong., 2d Sess. 60, 128 (April 14, 1988). In addition, the Department of Justice representative, Deputy Assistant Attorney General Robert Willmore, who appeared at the Congressional hearing and stated that "Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably by a Federal District Court." Legislation to Amend the Federal Tort Claims Act: Hearing, at 133.

However, the Fourth Circuit's holding in both Johnson v Carter and in this case, is in direct conflict with

nine other circuit courts that have addressed the reviewability of disputed scope-of-employment certifications and have uniformly held them to be subject to review.

The nine other circuits holding is well stated in the Second Circuit opinion in McHugh v. University of Vermont, 966 F.2d 67 (2nd Cir. 1992), which involved a sexual harassment suit against Lt. Col. by a secretary at University of Vermont, wherein that circuit court held that "[w]e believe that a scope-of-employment certification should be reviewed be reviewed de novo for purposes of substituting the United States as a defendant and precluding an action against the federal employee." at Id. p. 72. See North Shore Shipping Co. v United States, No. 92-3730, 8 WL 141054

1993 U.S.App LEXIS 89 (6th Cir. 1993) (scope certification subject to review by district court); Arbour v. Jenkins, 903 F.2d 416 (6th Cir. 1990); Schrob v. Catterson, 967 F.2d 929 (3d Cir. 1992) (Attorney General's scope of employment not conclusive and non reviewable); Snodgrass v Jones, 957 F.2d 482 (7th Cir. 1992) (Attorney General's scope of employment certification subject to de novo review); S.J. & W Ranch, Inc. v. Lehtinen, 913 F.2d 1538 (11th Cir. 1990) (district court should exercise de novo review of certification decision); Melo v. Hafer, 912 F.2d 628 (3rd Cir. 1990) (district court may review scope of employment certification decision), aff'd on separate grounds, \_\_ U.S. \_\_, 112 S.Ct. 358, 116 L.Ed.2d 301(1991); Nasuti v. Scannell, 906 F.2d 802 (1st

Cir. 1990) (district court should exercise its customary jurisdiction over scope-of-employment disputes that call into question its subject matter jurisdiction); Brown v. Armstrong, 949 F.2d 1007 (8th Cir. 1991); Meridian Intern. Logistics, Inc. v. United States, 939 F.2d 740 (9th Cir. 1991); Hamrick v. Franklin, 931 F.2d 1209 (7th Cir.), cert. denied \_\_\_ U.S. \_\_\_, 112 S.Ct. 200, 116 L.Ed.2d 159 (1991).

Apart from the Fourth Circuit, it can be argued that only possibly two other circuits have held that for purposes of removal substitution nonreviewable and mandatory upon certification, see Aviles v. Lutz, 887 F2d 1046 (10th Cir. 1989) (mandatory language of § 2679(d) does not permit federal court to review certification), and Mitchell v.

Carlson, 896 F2d 128, 136 (5th Cir. 1990) (district court required to substitute the United States following certification).

However, these two cases are factually distinguishable in that scope of employment was not a disputed issue.

Furthermore, in the Fifth Circuit, despite Mitchell v. Carlson recently in, a district court held that plaintiff is entitled to litigate before the district court the question of whether the employee was within the scope of his employment at the time of the incident. Dillon v. State of Miss., Military Dept., 827 F.Supp. 1258 (S.D. Miss. 1993)

Thus the Injured Parties argue that the Fourth Circuit is in error and the other nine circuits are correct in their

holding that the scope of employment certificate is subject to judicial review, based on the following:

First, Section 2679(d)(1) applies to cases filed in federal district courts, while Section 2679(d)(2) applies to those filed in state courts. Both sections provide: "Upon certification . . . the United States shall be substituted as the party defendant" (emphasis added). In addition, Section 2679(d)(2) provides: "Upon certification . . . [the claim] shall be removed . . . to the district court" (emphasis added). Thus, in federal cases the result of certification is substitution, while in state cases it is substitution plus removal. Notably, the only mention of nonreviewability pertains to removal:

"The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. § 2679(d)(2) (emphasis added).

Clearly, then, only certification for purposes of removal is nonreviewable; certification for purposes of substitution remains subject to judicial review. Had Congress intended to render the certification conclusive for purposes other than removal, it would have so stated. Cf. Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979) ("[W]hen Congress wishes to provide a private damage remedy, it knew how to do so and did so expressly." (Rehnquist, C.J.))

Second, the underlying policy consideration regarding the different ef-

fect of substitution vis-a-vis removal, supports the logical analysis of the two section to result in judicial review of the certification when substitution occurs.

Congressional rational in differentiating between the effect of certification as it relates to removal, on the one hand, and its effect on substitution, on the other, was pointed out by the Eighth Circuit in Brown v. Armstrong, 949 F.2d 1007 (8th Cir. 1991).

There the court noted that substitution will often end the plaintiff's case. However, "[t]he same concerns do not exist with automatic removal, which changes only the forum and not the substance of the case." Brown at 1011.

Third, the statutory interpretation urged by the Fourth Circuit is particu-

larly suspect because it leaves the determination of a dispositive issue in FTCA cases on an interested party. As the First Circuit cogently noted,

it is hard to imagine Congress empowering an executive officer, the Attorney General of the United States, to displace the federal court as the final determine of the scope of employment question, thus forcing a federal court to forego determination of its own jurisdiction, and preventing the plaintiff, by executive fiat, from pursuing a possible legitimate claim in state court." Nasuti v. Scannell, 906 F2d 802, 812 (1st Cir.)

Fourth, since the Fifth Amendment protects every "person" including an alien, whether resident or nonresident, from the deprivation of life, liberty or property without due process of law, Mathews v. Diaz, 96 S.Ct. 1883 (1976), the Fourth Circuit's holding raises due process implications inherent in treating the Attorney's General scope certification as dispositive, and denying

the Injured Party a right of action against Mr. Lamagno who was driving under the influence of alcohol.

As various courts have observed, nothing in the regulation governing scope certification requires the Attorney General to conduct a neutral proceeding, open to all parties, before taking a final position on the scope question.

In the instant action these concerns are even more imperative since here the Attorney General is the boss of the DEA.

Fifth, the Westfall Act modified the Federal Drivers Act in several respects, but there is nothing to show that the right to have "the trial judge determined the scope of employment issue as a matter of law." Petrousky v. United

States, 728 F.Supp 890, 891 (N.D.N.Y.), was amended. See McGowan v. Williams, 623 F.2d 1239, 1242 (7th Cir. 1980) (citing 28 U.S.C. § 2679(d)).

Therefore there is no evidence that Congress intended to eliminate judicial determination of the scope of employment issue, except with regard to removal, as was the practice under the Federal Drivers Act. Indeed, such an elimination would be extremely anomalous in light of the Westfall Act's empowering of federal employees to challenge a refusal by an Attorney General to certify scope of employment.

Sixth, the Fourth Circuit's holding additionally lacks merit under the legal concept that in the absence or inadequacy of a specific statute, nonstatutory review is presumptively available. This

is because the non-reviewability of administrative action taken pursuant to statute or regulations is not lightly to be inferred.

Judicial review of administrative action is the rule, and non-reviewability the exception which must be demonstrated. Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832 (1970). Only on a showing of "clear and convincing evidence" will the courts restrict access to judicial review. Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); Rusk v. Cort, 369 U.S. 367, 82 S.Ct. 787, 7 L.Ed.2d 809 (1962).

This is particularly true in an action based on the facts in this case, where despite complying with all the administrative procedures, the DEA has

failed to process the claim in good faith, and has interjected the absurd "James Bond Defense" that Mr. Lamagno while in the Republic of Colombia is on 24 hour call and thus all his acts are within his "scope of employment."

To this end suits seeking judicial review of federal agencies action or omissions under 28 U.S.C. § 1331 and the Administrative Procedures Act, 5 U.S.C. §§ 702 et seq., provide for declaratory and injunctive relief. Section 10 of the APA, 5 U.S.C. § 702, states that any person suffering legal wrong or adversely affected or aggrieved by an agency's action within the meaning of a relevant statute may seek judicial review thereof.

The Injured Parties argue that based on the facts presented, which must

be taken as true based on the summary judgement motion, they have met their burden of presenting "specific facts rebutting the government's scope of employment certification." Brown v. Armstrong, 949 F.2d 1007 at p. 1012 (8th Cir. 1991); Hamrick v. Franklin, 931 F.2d 1209 at 1211 (7th Cir. 1991), and the district court was required to conduct at least limited judicial review of the Attorney General's scope-of-employment certification before substituting the United States as defendant.

Since this was not done, the Court must remand action against Mr. Lamagno in his own person based on diversity jurisdiction.

II. THE INJURED PARTIES IN AN AUTOMOBILE ACCIDENT OCCURRING IN THE REPUBLIC OF COLOMBIA HAVE A JUDICIALLY ENFORCEABLE RIGHT TO COMPENSATION UNDER 21 U.S.C. § 904.

Unless Congress expressly authorized suit against the Federal Government and its agencies, and thereby waive sovereign immunity, they are not sue and be sued entities. United States v. Testan, 424 U.S. 392, at 399 (1976).

Thus to avoid dismissal for lack of jurisdiction the Injured Parties must establish that Congress consented to suit by waiving immunity. Holloman v. Watt, 708 F.2d 1399, at 1401 (9th Cir. 1983), cert. denied. Holloman v. Clark, 466 U.S. 958, 104 S.Ct. 2168, 80 L.Ed.2d 552 (1984).

Normally a tort action against the United States would be permitted since Congress enacted the Federal Tort Claims

Act, 26 U.S.C. § 2671 et seq. (hereinafter "FTCA"), to provide the means to sue the Federal Government, and its agencies under 28 U.S.C. § 1346(b), for damages as a result of a tort.

However, FTCA is a limited waiver of sovereign immunity, and 28 U.S.C. § 2680(k) states that the Federal Government is not liable for damages for "any claim arising in a foreign country." Thus it has also been held that the District Court has no jurisdiction over any claim excluded by 28 U.S.C. § 2680(k). United States v. Mitchell, 445 U.S. 535, at 538 (1980).

Based on the above, Drug Enforcement Administration and the United States argued that 28 U.S.C. § 2680(k), excluded an action based on a tort which occurred in the Republic of Colombia.

However, the express language of 21 U.S.C. § 904, established an exception to the exclusions under 28 U.S.C. § 2680(k), by Congress expressly authorized the compensation for tort claims for acts or omission arising in a foreign country as a result of Drug Enforcement Administration operations. Thus once the jurisdictional requirements of 28 U.S.C. § 2675 has been satisfied by the filing of the administrative claim which was accepted by DEA Headquarters and forwarded to the Tort Division, United States Department of Justice on May 16, 1991, in accordance with 28 U.S.C. § 2672, the Injured Parties claim fell under the Federal Tort Claims Act.

The DEA admit that the Injured Parties have complied with the filing of the administrative claim requirements

contained in 28 U.S.C. § 2675, when they filed a timely claim against DEA Headquarters on May 8, 1991. Also the DEA have admitted that they processed the administrative claim of the Injured Parties under 21 U.S.C. § 904. Finally, the DEA admit that the Injured Parties actively participated in supplying all information and medical reports in support of their claim.

Therefore the Fourth Circuit opinion is in error because under the provision of the FTCA once the Injured Parties filed an administrative claim with a certain sum for damages, and complied with each request for additional information in support of said claim, they more than meet the requirement of 28 U.S.C. § 2675. Thus under that section they have a right to judicial re-

view. Wellman v Gross, 637 F.2d 544 (8th Cir. 1980), cert den 102 S.Ct. 389; Lien v. Beehner, 453 F.Supp. 604 (N.D.N.Y., 1978) [action untimely even though government employment of tortfeasor was shielded both from the public and the plaintiff]; Driggers v. United States, 309 F.Supp 1377 (S.C., 1970).

The DEA certified that Mr. Lamagno was acting within the scope of employment with DEA operations in the Republic of Colombia, thus the DEA became liable to suit under the FTCA, particularly since the United States places strict controls on its agents activities and use of government vehicles in foreign countries, and imposes sanctions on employees who violate said controls, See generally 31 U.S.C. § 1343 and 31 U.S.C. § 1349.

Thus in accordance with 21 U.S.C. § 904, the DEA and the United States are subject to suit for acts or omissions as a result of DEA operations in the Republic of Colombia.

#### CONCLUSION

The Fourth Circuit has held in this instant petition that in all instances conclusive nonreviewable effect will be given to the Attorney General's determination under 28 U.S.C. § 2679(d)(1).

The opinion of the Fourth Circuit denies to court's authority to review the decisions of the executive branch's legal office despite the unsavory appearance of unfairness that is apparent in dismissing of the instant petition given the "James Bond Defense" of the Drug Enforcement Administration, and where, as here, its decisions determine

litigation in which it is an interested party.

Quite apart from the constitutional problems of separation of powers and due process, the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits on the same matter, have refused to give nonreviewable conclusive effect to the Attorney General's determination under 28 U.S.C. § 2679(d)(1).

Thus nine other circuits have held that all of the traditional interpretative tools point to the conclusion that Congress intended in 28 U.S.C. § 2679(d)(1) the subjecting the Attorney General's certification to judicial review.

Thus this Court should grant certiorari so to resolve this dispute be-

tween the holdings in nine circuits, and that of the Fourth Circuit Court of Appeal.

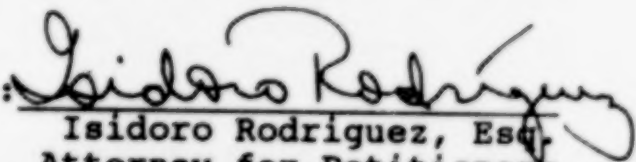
Furthermore, Congress under 21 U.S.C. § 904, included within the FTCA an action against the Drug Enforcement Administration for a tort caused by that agency in its operations abroad. The Drug Enforcement Administration has certified that Mr. Dirk A. Lamagno, although driving recklessly under the influence of alcohol, after work hours, and in the company of an identified woman, was acting within the scope of his employment with DEA. Thus once the injured parties complied with 28 U.S.C. § 2675, the district court had jurisdiction under 28 U.S.C. § 1346(b).

Therefore this Court should issue a writ of certiorari so to assure confor-

mity among the circuits in the application of 28 U.S.C. § 2679(d)(1). As well as assure compliance with the intent of Congress in enacting 21 U.S.C. § 904.

Respectfully submitted,

KATIA GUTIERREZ DE MARTINEZ,  
EDUARDO MARTINEZ PUCCINI,  
AND HENNY MARTINEZ DE PAPAANI,

By:   
Isidoro Rodriguez, Esq.  
Attorney for Petitioners

LAW OFFICE OF ISIDORO RODRIGUEZ P.C.  
Calle 84 No. 56-51  
Piso 2, Office 4  
Barranquilla, Colombia S.A.  
Telephone and Telefax  
(011)5758-561678  
Virginia Bar No. 21573

## APPENDIX-A

1-a

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

KATIA GUTIERREZ DE )  
MARTINEZ, EDUARDO MARTINEZ )  
PUCCINI, and HENNY MARTINEZ )  
DE PAPIANI, )

Plaintiffs, )

v. )

THE DRUG ENFORCEMENT )  
ADMINISTRATION, and THE )  
UNITED STATES OF AMERICA, )

Defendants. )

) CIVIL ACTION  
) NO. 93-0055-A

ORDER

For reasons stated from the bench,  
it is hereby ORDERED that the defendats'  
motion to dismiss is GRANTED, and this  
case is DISMISSED.

\_\_\_\_\_/s/  
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia  
April 20, 1993

APPENDIX-B

1-b

UNPUBLISHED

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

KATIA GUTIERREZ DE MARTINEZ;	:
EDUARDO MARTINEZ PUCCINI;	:
HENNY MARTINEZ DE PAPAIANI,	:
Plaintiffs-Appellants,	:
	:
v.	: No.93-1573
	:
DIRK A. LAMAGNO; DRUG	:
ENFORCEMENT ADMINISTRATION;	:
UNITED STATES OF AMERICA,	:
Defendants-Appellees.	:
	:

Appeal from the United States District  
Court for the Eastern District of Virgin-  
ia, at Alexandria.

Claude M. Hilton, District Judge.  
(CA-93-55-A)

Submitted: December 2, 1993

Decided: April 28, 1994

Before Hall, Wilkinson, and Williams,  
Circuit Judges.

Affirmed by unpublished per curiam opin-  
ion.

COUNSEL

Isidoro Rodriguez C., LAW OFFICE OF ISID-  
ORO RODRIGUEZ & SIBLEY P.C., Barran-

quilla, Columbia, for Appellant, Kenneth E. Melson, United States Attorney, Rachel C. Ballow, Assistant United States Attorney, Alexandria, Virginia, for Appellees.

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Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

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OPINION

PER CURIAM:

Appellants Katia Gutierrez de Martinez, Eduardo Martinez Puccini, and Henny Martinez de Papaiani ("Appellants") appeal the district court's dismissal of their personal injury action brought against the Drug Enforcement Administration ("DEA"), DEA Special Agent Dirk A. Lamagno, and the United States pursuant to the Federal Tort Claims Act ("FTCA" or "Act"), 28 U.S.C.A. §2671 (West Supp. 1993). Finding no error, we affirm.

Appellants, citizens of the Republic of Colombia, seek general and special damages for physical injuries and property damage incurred in an automobile accident that occurred on the night of January 18, 1991, in Barranquilla, Colombia. Defendant Lamagno, driving a government-owned Ford Bronco, collided with Appellants' vehicle in an intersection.

Appellants filed an administrative claim with the DEA pursuant to 21 U.S.C. §904 (1988) on May 8, 1991. Because the amount of the claim exceeded the DEA's

limited settlement authority,<sup>1</sup> the claim was referred to the Department of Justice. No final administrative decision has yet been issued on that claim.

In the absence of a final decision on their administrative claim, and to avoid a statute of limitations bar, Appellants filed this action against Lamagno, the DEA, and the United States. The United States Attorney filed a Certification of Scope of Employment and Notice of Substitution of the United States for Defendant Lamagno pursuant to 28 U.S.C.A. §2679(d)(1) (West Supp.1993). The district court substituted the United States for Defendant Lamagno and dismissed Lamagno from the case. Defendants then moved to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The district court granted that motion. Appellants appeal.

We review de novo the dismissal of a case pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(6). *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir.1989). Dismissal is appropriate where it appears beyond doubt that the plaintiff can prove no set of facts to support his allegations. *Id.*

The FTCA acts as a waiver of the United States's sovereign immunity in limited circumstances. However, the Act specifically excludes certain types of claims, preserving the immunity of the United States. One such exclusion is for

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<sup>1</sup>28 U.S.C.A. §2672 (West Supp.1993).

"any claim arising in a foreign country." 28 U.S.C. §2680(k) (1988). Accordingly, the United States cannot be subjected to a tort suit of negligence based on an act or omission by an employee or agent of the United States where the claim giving rise to the suit occurred in a foreign country.

The district court properly found that this case falls squarely within the foreign country exception to the Act. It is undisputed that the automobile accident that caused Appellants' injuries occurred in Barranquilla, Colombia, a foreign country. Moreover, the alleged negligence which proximately caused the accident (failure to adhere to local traffic rules and improper operation of a motor vehicle) arose in Barranquilla.

Appellants advance two arguments to avoid the effect of the foreign country exemption from the FTCA. First, Appellants argue that they are entitled to judicial review under 21 U.S.C. §904 (1988). We disagree. Section 904 states:

Notwithstanding section 2680(k) of Title 28, the Attorney General, in carrying out the functions of the Department of Justice under this subchapter, is authorized to pay tort claims in the manner authorized by section 2672 of Title 28, when such claims arise in a foreign country in connection with the operation of the Drug Enforcement Administration abroad.

The plain language of §904 makes no provision for judicial review and we will not broadly imply a waiver of sovereign immunity. *United States v. Testan*, 424 U.S. 392, 399 (1975). Moreover, while §904 does make reference to §2680(k) (the foreign country exception to the FTCA) and §2672 (allowing administrative payment of claims under the FTCA), we think it notable that §904 does not reference any other statutory provision suggestive of a judicial remedy. Accordingly, we reject Appellants' attempt to circumvent the foreign country exception by means of §904.

Appellants also contend that their case falls within the "headquarters claim" exception to the foreign country exclusion of the FTCA. Specifically, Appellants maintain that the alleged negligence occurred in the United States and not in Colombia. The district court rejected that argument, as do we.

A headquarters claim exists where negligent acts in the United States proximately cause harm in a foreign country. Such claims typically involve allegations of negligence by agents located in the United States in the guidance of employees who cause damage while in a foreign country, or of activities which take place in a foreign country. *Cominotto v. United States*, 802 F.2d 1127, 1130 (9th Cir. 1986).

To establish a headquarters claim Appellants must establish a plausible proximate nexus between the acts or omissions in the United States and the re-

sulting damage or injury in a foreign country. See *Eaglin v. United States, Dep't of Army*, 794 F.2d 981, 983 (5th Cir. 1986). The district court's findings regarding proximate causation is a factual one, subject to a clearly erroneous standard of review. *Cominotto*, 802 F.2d at 1130. Here, the district court's findings that Appellants failed to demonstrate that the acts or omissions of the United States employees at the DEA Headquarters in Arlington, Virginia, were the proximate cause of the automobile accident in Barranquilla, Colombia is not clearly erroneous.

Appellants cited no authority holding that federal agencies have a duty to provide additional instruction to their employees, properly licensed under state law, before permitting them to operate government vehicles in foreign countries. Thus, the alleged negligence by headquarters personnel is too attenuated to support a headquarters claim in this case. *Eaglin*, 794 F.2d at 984 n.4. Therefore, we affirm the district court's order dismissing the case for lack of jurisdiction.

We also affirm the district court's order substituting the United States in place of Defendant Lamagno. The FTCA provides that if the Attorney General certifies that the defendant employee was acting within the scope of his employment, the United States shall be substituted as the party defendant. 28 U.S.C.A. §2679(d)(1).

The law in this Circuit is clear that such a certification is conclusive. *Johnson v. Carter*, 983 F.2d 1316, 1320 (4th Cir.) (en banc), *cer. denied*, 62 U.S.L.W. 3244 (U.S. 1993). Specifically, we have held that no discretion is given to the district court to review the Attorney General's certification made pursuant to 28 U.S.C.A. §§2679(d)(1), (2). *Johnson*, 983 F.2d at 1319. Thus, the district court lacked discretion to review the United States Attorney's determination that Lamagno was acting within the scope of his employment at the time of the accident in Colombia. *Id.*

Finding no error, we affirm the district court's orders.<sup>2</sup> We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

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<sup>2</sup>We note that Appellants may yet receive redress for their injuries by virtue of the administrative claim they filed pursuant to 21 U.S.C. §904.

FILED  
OCT 24 1994

OFFICE OF THE CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1994

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KATIA GUTIERREZ DE MARTINEZ, ET AL.,  
PETITIONERS

*v.*

DIRK A. LAMAGNO, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

**BRIEF FOR THE UNITED STATES**

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DREW S. DAYS, III  
*Solicitor General*

FRANK W. HUNGER  
*Assistant Attorney General*

BARBARA L. HERWIG

PETER R. MAIER  
*Attorneys*

*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 514-2217*

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### **QUESTIONS PRESENTED**

1. Whether the Attorney General's certification under the Westfall Act, 28 U.S.C. 2679(d), that a government employee was acting within the scope of employment conclusively requires that the United States be substituted for the employee as the defendant in a civil action.

2. Whether Section 709 of the Controlled Substances Act, 21 U.S.C. 904, which authorizes the Attorney General to pay tort claims arising from operations of the Drug Enforcement Administration abroad, gives petitioner a right of action for damages against the United States.

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## In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-167

KATIA GUTIERREZ DE MARTINEZ, ET AL.,  
PETITIONERS

*v.*

DIRK A. LAMAGNO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-7b) is unpublished, but the decision is noted at 23 F.3d 402 (Table). The order of the district court (Pet. App. 1a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 28, 1994. The petition for a writ of certiorari was filed on July 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

The principal question presented in this case is whether the Attorney General's certification that a federal employee was acting within the scope of employment is conclusive for purposes of substitution of the United States as the defendant in a pending tort action. In its decision below, the court of appeals followed its prior decision in *Johnson v. Carter*, 983 F.2d 1316, 1319-1321 (4th Cir.) (en banc), cert. denied, 114 S. Ct. 57 (1993), and concluded that the Attorney General's certification is conclusive and not subject to judicial review.

1. This Court held in *Westfall v. Erwin*, 484 U.S. 292 (1988), that the judicially created doctrine of official immunity does not provide complete protection to federal government employees for torts committed within the scope of their employment. Congress subsequently enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. The Westfall Act provides immunity to government employees for torts committed while acting within the scope of their employment by requiring that the United States be substituted as the defendant. The suit then proceeds against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*

The Westfall Act accomplishes this result through statutory language that states in relevant part:

(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil

action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. 2679(d)(1).<sup>1</sup> The remedy against the United States "is exclusive of any other civil action or proceeding for money damages \* \* \* against the employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1). The Attorney General has delegated the authority to certify that an employee was acting within the scope of the employee's office or employment to the United States Attorneys, who make scope certification deter-

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<sup>1</sup> Subsection (d) also authorizes the United States to remove actions from state court:

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. 2679(d)(2).

minations in consultation with the Department of Justice. See 28 C.F.R. 15.3.

2. Petitioners are citizens of the Republic of Colombia. They allege that on January 18, 1991, respondent Dirk A. Lamagno, a Special Agent employed by the Drug Enforcement Administration (DEA), caused an automobile accident in Barranquilla, Colombia. Lamagno was the driver of a government-owned Ford Bronco that collided with the car in which petitioners were occupants. Petitioners seek general and specific damages for physical injuries and property damage. Pet. App. 2b. See Pet. 5-9.

On May 8, 1991, petitioners filed an administrative claim with the DEA pursuant to Section 709 of the Controlled Substances Act, as amended, which states:

Notwithstanding section 2680(k) of title 28,<sup>2</sup> the Attorney General, in carrying out the functions of the Department of Justice under this subchapter, is authorized to pay tort claims in the manner authorized by section 2672 of title 28,<sup>3</sup> when such claims arise in a foreign country in connection with the operations of the Drug Enforcement Administration abroad.

21 U.S.C. 904 (as amended by the Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 13, 93 Stat. 1048). The Drug Enforcement Administration lacked authority

<sup>2</sup> Section 2680(k) excepts "[a]ny claim arising in a foreign country" from the FTCA and Title 28's provisions governing tort claim procedure.

<sup>3</sup> Section 2672 deals with administrative adjustment of claims.

to resolve a claim in the dollar amount that petitioners requested, and it referred the claim to the Department of Justice. The Department has not made a final administrative decision on that claim. Pet. App. 2b-3b.

On January 15, 1993, petitioners filed this action in the United States District Court for the Eastern District of Virginia based on diversity of citizenship. The United States Attorney certified on behalf of the Attorney General that respondent Lamagno was acting within the scope of his office or employment under the Westfall Act and moved to substitute the United States as the defendant. See 28 U.S.C. 2679(d)(1). The district court substituted the United States in place of Lamagno and dismissed him from the action. The United States then moved to dismiss the suit on the ground that the United States has retained its immunity for suits based on "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). The district court granted the motion and dismissed the action. Pet. App. 1a, 3b.

The court of appeals affirmed the order of the district court that substituted the United States as defendant in place of Lamagno. Pet. App. 1b-7b. It held that, under the law of the circuit, a certification by the Attorney General that an employee was acting within the scope of his office or employment at the time of the incident that gave rise to the claim is conclusive and not subject to judicial review. Pet. App. 6b-7b. See *Johnson v. Carter*, 983 F.2d 1316, 1319-1321 (4th Cir.) (en banc), cert. denied, 114 S. Ct. 57 (1993). It also concluded that Section 709 of the Controlled Substances Act, 21 U.S.C. 904, did not provide a basis for petitioners' suit, because that

provision is not a waiver of sovereign immunity and because it does not provide for judicial review of the Attorney General's actions on tort claims arising in a foreign country. Pet. App. 4b-5b. The court of appeals further rejected petitioners' argument that their claim is based on "headquarters" negligence originating in the District of Columbia and therefore is not barred by 28 U.S.C. 2680(k). Pet. App. 5b-6b.

### DISCUSSION

Petitioners challenge the court of appeals' determination that respondent Lamagno was acting within the scope of his employment for purposes of the Westfall Act at the time of the auto accident from which their claims arise. Petitioners specifically take issue with the court of appeals' ruling that the Attorney General's scope-of-employment certification is conclusive under the Westfall Act. Pet. 12-30. We believe that the court of appeals' ruling on this question was incorrect, and we agree that this issue warrants review by this Court.

1. The Westfall Act does not expressly provide for judicial review of the Attorney General's certification decisions. Immediately after enactment of the Westfall Act, the United States took the position that the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review. The United States subsequently reconsidered its position, however, and concluded that a certification decision made under 28 U.S.C. 2679(d)(1) is judicially reviewable. See U.S. Br. in Opp. in *Lehtinen v. S.J. & W. Ranch, Inc.*, cert. denied, 112 S. Ct. 62 (1991) (No. 90-1789); U.S. Br. in Opp. in *Johnson v. Carter*, cert. denied, 114 S. Ct. 57 (1993) (No. 92-

1591). Despite the United States' position, the Fourth Circuit has held that the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review. See *Johnson v. Carter*, 983 F.2d 1316, 1319-1321 (en banc), cert. denied, 114 S. Ct. 57 (1993).

The Fourth Circuit's ruling that the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review decides a significant question of federal law on which there is a square conflict among the courts of appeals. The Fourth Circuit's holding finds support in the decisions of two courts of appeals that have suggested, in cases in which the Attorney General's certification was not challenged, that the certification decision must be given conclusive effect.<sup>4</sup> Seven other courts of appeals, however, have reached a contrary result and have allowed judicial review of the certification decision.<sup>5</sup> Because the Fourth

<sup>4</sup> See *Mitchell v. Carlson*, 896 F.2d 128, 136 (5th Cir. 1990); *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989). On September 12, 1994, the Fifth Circuit heard argument en banc in *Garcia v. United States*, No. 92-8490, which presents the question whether the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review. The question is also presented in a petition for certiorari filed from another Fifth Circuit decision that is currently pending before this Court. See *King Fisher Marine Serv., Inc. v. Perez*, No. 94-48. We are filing a response to that petition simultaneously with this brief.

<sup>5</sup> See *Schrob v. Catterson*, 967 F.2d 929, 935 (3d Cir. 1992); *Brown v. Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991); *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 744-745 (9th Cir. 1991); *Hamrick v. Franklin*, 931 F.2d 1209, 1210-1211 (7th Cir.), cert. denied, 112 S. Ct. 200 (1991); *S.J. &*

Circuit's position was established in an en banc decision, *Johnson v. Carter, supra*, the conflict is likely to persist. Accordingly, the Court should grant the petition to review whether the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review for the purpose of the substitution of the United States as defendant.<sup>6</sup>

2. The other question raised in the petition, whether petitioners are entitled to judicial review under Section 709 of the Controlled Substances Act, does not warrant further consideration by this Court. By its plain language, Section 709 simply grants the Attorney General discretion to pay tort claims when such claims arise from DEA activities in foreign countries. See 21 U.S.C. 904. Section 709 does not waive the United States' sovereign immunity or allow for judicial review of the Attorney General's decision to pay or not pay a claim. This Court has repeatedly refused to infer that Congress has waived the United

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*W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1543, modified, 924 F.2d 1555 (11th Cir. 1990), cert. denied, 112 S. Ct. 62 (1991); *Nasuti v. Scannell*, 906 F.2d 802, 812-814 (1st Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).

<sup>6</sup> The Justice Department has represented Mr. Lamagno in the proceedings below. We have notified him that the United States will take a position in this litigation that is potentially contrary to his personal interests and that he may wish to retain private counsel to represent his interests before this Court. In the event that Mr. Lamagno does not enter an appearance through retained counsel, this Court may wish to appoint counsel to defend the Fourth Circuit's decision and to ensure that this Court has the benefit of an adversarial presentation. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968).

States' sovereign immunity through statutory language that does not "unequivocally" express that intent. *E.g., United States v. Testan*, 424 U.S. 392, 399 (1976). There is no conflict among the courts of appeals on this question, and the decision of the court of appeals below does not conflict with any decision of this Court.

### CONCLUSION

The petition for a writ of certiorari should be granted limited to question one.

Respectfully submitted.

DREW S. DAYS, III  
Solicitor General

FRANK W. HUNGER  
Assistant Attorney General

BARBARA L. HERWIG  
PETER R. MAIER  
Attorneys

OCTOBER 1994

DEC 13 1994

OFFICE OF THE CLERK

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1994

*Katia Martinez, Eduardo Martinez Puccini,  
and Henny Martinez de Papaiani,*

Petitioners,

v.

*Dirk A. Lamagno, The Drug Enforcement  
Administration, and the United States of  
America,*

Respondents.

On Writ of Certiorari to the  
United States Court of Appeals for the  
Fourth Circuit

## JOINT APPENDIX

ISIDORO RODRIGUEZ, ESQ.  
Attorney for Petitioners

DREW S. DAYS, III  
Solicitor General

Law Offices of  
Isidoro Rodriguez, P.C.  
Calle 84, No. 56-51  
Piso 2, Oficina 4  
Barranquilla, Colombia  
(011)57-58-561678/458273

BARBARA L. HERWIG  
PETER R. MAIER  
Attorneys

Department of Justice  
Washington, D.C 20530  
(202)514-2217

JOINT APPENDIX

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03/04/93	Notice of Substitu- tion. . . . .	JA-3
03/05/93	Order dismissing action against Dirk A. Lamagno with prejudice. . . . .	JA-7
04/20/93	District Court Order Granting Defendants' Motion to Dismiss. . . .	JA-9
04/28/94	Unpublished opinion of the United States Court of Appeals for the Fourth Circuit. . .	JA-10

IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

KATIA GUTIERREZ DE MARTINEZ, )  
EDUARDO MARTINEZ PUCCINI, )  
and HENNY MARTINEZ DE )  
PAPAIANI )

Plaintiffs, )

v. )

) Civil Action  
) No. 93-55-A  
)

DIRK A. LAMAGRO, THE DRUG )  
ENFORCEMENT ADMINISTRATION, )  
AND THE UNITED STATES OF )  
AMERICA. )

Defendants. )  
-----

CERTIFICATION OF SCOPE OF EMPLOYMENT

I, Richard Cullen, United States Attorney for the Eastern District of Virginia, acting pursuant to the provisions of 28 U.S.C. § 2679, and by virtue of the authority vested in me by the Appendix to 28 C.F.R. §15.3 (1991), hereby certify that I have investigated the circumstances of the incident upon

JA-1

which the plaintiff's claim is based. On the basis of the information now available with respect to the allegations of the complaint, I hereby certify that defendant Dirk A. Lamagno was acting within the scope of his employment as an employee of the United States of America at the time of the incident giving rise to the above entitled action.

/s/

RICHARD CULLEN  
United States Attorney

Dated: 3/3/93

JA-2

IN THE UNITED STATES DISTRICT COURT FOR  
THEEASTERN DISTRICT OF VIRGINIA

Alexandria Division

KATIA GUTIERREZ DE MARTINEZ,	)
EDUARDO MARTINEZ PUCCINI,	)
and HENNY MARTINEZ DE	)
PAPAIANI	)
	)
Plaintiffs,	)
	)
v.	) Civil Action
	) No. 93-55-A
DIRK A. LAMAGRO, THE DRUG	)
ENFORCEMENT ADMINISTRATION,	)
AND THE UNITED STATES OF	)
AMERICA.	)
	)
Defendants.	)

-----

NOTICE OF SUBSTITUTION

PLEASE TAKE NOTICE that pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988), the United States is hereby substituted for Defendant Dirk A. Lamagro.<sup>1</sup> The

<sup>1</sup> The correct spelling of the name of the defendant Drug Enforcement Agent is Dirk A. Lamagno.

grounds for this substitution are:

1. Plaintiff alleges that Defendant Dirk A. Lamagno has committed tortious acts caused by the negligent and wrongful operation of a motor vehicle, resulting in injuries to the plaintiff. The actions alleged in the complaint were committed while the defendant was acting within the scope of his employment with the United States Department of Justice, Drug Enforcement Administration.

2. The Federal Tort Claims Act, 28 U.S.C. § 2679(d)(1), as amended by Pub. L. No. 100-694, 102 Stat. 4563 (1988), provides that a suit against the United States shall be the exclusive remedy for persons with claims for damages resulting from the alleged common law torts of federal employees committed within the scope of their office or employment. The plaintiff seeks compensatory damages for

injuries resulting from the allegedly negligent acts of the defendant.

3. Section 2679(d)(1) of Title 28 United States Code as amended by Pub. L. No. 100-694, 102 Stat. 4563 (1988), provides that upon certification by the Attorney General that a federal employee was acting within the scope of employment at the time of the incident out of which the common law claims arise, any civil action arising out of the incident on such claims shall be deemed an action against the United States and the United States shall be substituted as sole defendant with respect to those claims. The Attorney General has delegated certification authority to the United States Attorneys. 28 C.F.R. § 15.3.

4. There are two exceptions to the Exclusivity provisions which are codified at 28 U.S.C. § 2679(b)(2). Neither ex-

ception applies to the claims asserted by the plaintiff.

5. Richard Cullen, United States Attorney for the Eastern District of Virginia, has certified that at the time of the conduct alleged Defendant Dirk A. Lamagno was acting within the scope of his employment.

For the foregoing reasons, the United States is substituted as the defendant with respect to the claims asserted against Defendant Dirk A. Lamagno. The court is respectfully referred to the attached Certification of Scope of Employment.

Respectfully submitted,

RICHARD CULLEN  
UNITED STATES ATTORNEY

By:                     /s/                      
Rachel C. Ballow  
Assistant United States Attorney  
1101 King Street, Suite 502  
Alexandria, Virginia 22314  
Virginia Bar No. 31026  
(703) 706-3785

IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

KATIA GUTIERREZ DE MARTINEZ, )  
EDUARDO MARTINEZ PUCCINI, )  
and HENNY MARTINEZ DE )  
PAPAIANI )

Plaintiffs, )

v. )

) Civil Action  
) No. 93-55-A  
)

DIRK A. LAMAGRO, THE DRUG )  
ENFORCEMENT ADMINISTRATION, )  
AND THE UNITED STATES OF )  
AMERICA. )

Defendants. )  
-----

ORDER

Upon notice of the substitution of  
the United States for Defendant Dirk A.  
Lamagro, it is hereby

ORDERED, pursuant to 28 U.S.C. §  
2679(d)(1) as amended by Public Law 100-  
694, that the United States be substitut-  
ed as defendant herein in place of Defen-

JA-7

dant Dirk A. Lamagno and that the caption  
of the action be amended accordingly.

It is FURTHER ORDERED that as to  
Dirk A. Lamagno, this action is dismissed  
with prejudice.

This 5th day of March, 1993.

/s/  
UNITED STATES DISTRICT JUDGE

JA-8

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

KATIA GUTIERREZ DE )  
MARTINEZ, EDUARDO MARTINEZ )  
PUCCINI, and HENNY MARTINEZ )  
DE PAPIANI, )  
Plaintiffs, )  
v. ) CIVIL ACTION  
THE DRUG ENFORCEMENT ) NO. 93-0055-A  
ADMINISTRATION, and THE )  
UNITED STATES OF AMERICA, )  
Defendants. )

ORDER

For reasons stated from the bench,  
it is hereby ORDERED that the defendats'  
motion to dismiss is GRANTED, and this  
case is DISMISSED.

/s/  
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia  
April 20, 1993

JA-9

UNPUBLISHED

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

KATIA GUTIERREZ DE MARTINEZ; :  
EDUARDO MARTINEZ PUCCINI; :  
HENNY MARTINEZ DE PAPIANI, :  
Plaintiffs-Appellants, :  
v. : No.93-1573  
DIRK A. LAMAGNO; DRUG :  
ENFORCEMENT ADMINISTRATION; :  
UNITED STATES OF AMERICA, :  
Defendants-Appellees. :  
:

Appeal from the United States District  
Court for the Eastern District of Virgin-  
ia, at Alexandria.

Claude M. Hilton, District Judge.  
(CA-93-55-A)

Submitted: December 2, 1993

Decided: April 28, 1994

Before Hall, Wilkinson, and Williams,  
Circuit Judges.

Affirmed by unpublished per curiam opin-  
ion.

COUNSEL

Isidoro Rodriguez C., LAW OFFICE OF ISID-  
ORO RODRIGUEZ & SIBLEY P.C., Barran-  
quilla, Columbia, for Appellant,  
Kenneth E. Melson, United States Attor-

JA-10

ney, Rachel C. Ballow, Assistant United States Attorney, Alexandria, Virginia, for Appellees.

---

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

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OPINION

PER CURIAM:

Appellants Katia Gutierrez de Martinez, Eduardo Martinez Puccini, and Henny Martinez de Papaiani ("Appellants") appeal the district court's dismissal of their personal injury action brought against the Drug Enforcement Administration ("DEA"), DEA Special Agent Dirk A. Lamagno, and the United States pursuant to the Federal Tort Claims Act ("FTCA" or "Act"), 28 U.S.C.A. §2671 (West Supp. 1993). Finding no error, we affirm.

Appellants, citizens of the Republic of Colombia, seek general and special damages for physical injuries and proper-

ty damage incurred in an automobile accident that occurred on the night of January 18, 1991, in Barranquilla, Colombia. Defendant Lamagno, driving a government-owned Ford Bronco, collided with Appellants' vehicle in an intersection.

Appellants filed an administrative claim with the DEA pursuant to 21 U.S.C. §904 (1988) on May 8, 1991. Because the amount of the claim exceeded the DEA's limited settlement authority,<sup>2</sup> the claim was referred to the Department of Justice. No final administrative decision has yet been issued on that claim.

In the absence of a final decision on their administrative claim, and to avoid a statute of limitations bar, Appellants filed this action against Lamagno, the DEA, and the United States.

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<sup>2</sup>28 U.S.C.A. §2672 (West Supp.1993).

The United States Attorney filed a Certification of Scope of Employment and Notice of Substitution of the United States for Defendant Lamagno pursuant to 28 U.S.C.A. §2679(d)(1) (West Supp.1993). The district court substituted the United States for Defendant Lamagno and dismissed Lamagno from the case. Defendants then moved to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The district court granted that motion. Appellants appeal.

We review de novo the dismissal of a case pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(6). *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir.1989). Dismissal is appropriate where it appears beyond doubt that the plaintiff can prove no set of facts to support his allegations. *Id.*

The FTCA acts as a waiver of the United States's sovereign immunity in limited circumstances. However, the Act specifically excludes certain types of claims, preserving the immunity of the United States. One such exclusion is for "any claim arising in a foreign country." 28 U.S.C. §2680(k) (1988). Accordingly, the United States cannot be subjected to a tort suit of negligence based on an act or omission by an employee or agent of the United States where the claim giving rise to the suit occurred in a foreign country.

The district court properly found that this case falls squarely within the foreign country exception to the Act. It is undisputed that the automobile accident that caused Appellants' injuries occurred in Barranquilla, Colombia, a foreign country. Moreover, the alleged

negligence which proximately caused the accident (failure to adhere to local traffic rules and improper operation of a motor vehicle) arose in Barranquilla.

Appellants advance two arguments to avoid the effect of the foreign country exemption from the FTCA. First, Appellants argue that they are entitled to judicial review under 21 U.S.C. §904 (1988). We disagree. Section 904 states:

Notwithstanding section 2680(k) of Title 28, the Attorney General, in carrying out the functions of the Department of Justice under this subchapter, is authorized to pay tort claims in the manner authorized by section 2672 of Title 28, when such claims arise in a foreign country in connection with the operation of the Drug Enforcement Administration abroad.

The plain language of §904 makes no provision for judicial review and we will not broadly imply a waiver of sovereign

immunity. *United States v. Testan*, 424 U.S. 392, 399 (1975). Moreover, while §904 does make reference to §2680(k) (the foreign country exception to the FTCA) and §2672 (allowing administrative payment of claims under the FTCA), we think it notable that §904 does not reference any other statutory provision suggestive of a judicial remedy. Accordingly, we reject Appellants' attempt to circumvent the foreign country exception by means of §904.

Appellants also contend that their case falls within the "headquarters claim" exception to the foreign country exclusion of the FTCA. Specifically, Appellants maintain that the alleged negligence occurred in the United States and not in Colombia. The district court rejected that argument, as do we.

A headquarters claim exists where

negligent acts in the United States proximately cause harm in a foreign country. Such claims typically involve allegations of negligence by agents located in the United States in the guidance of employees who cause damage while in a foreign country, or of activities which take place in a foreign country. *Cominotto v. United States*, 802 F.2d 1127, 1130 (9th Cir. 1986).

To establish a headquarters claim Appellants must establish a plausible proximate nexus between the acts or omissions in the United States and the resulting damage or injury in a foreign country. See *Eaglin v. United States, Dep't of Army*, 794 F.2d 981, 983 (5th Cir. 1986). The district court's findings regarding proximate causation is a factual one, subject to a clearly erroneous standard of review. *Cominotto*, 802

F.2d at 1130. Here, the district court's findings that Appellants failed to demonstrate that the acts or omissions of the United States employees at the DEA Headquarters in Arlington, Virginia, were the proximate cause of the automobile accident in Barranquilla, Colombia is not clearly erroneous.

Appellants cited no authority holding that federal agencies have a duty to provide additional instruction to their employees, properly licensed under state law, before permitting them to operate government vehicles in foreign countries. Thus, the alleged negligence by headquarters personnel is too attenuated to support a headquarters claim in this case. *Eaglin*, 794 F.2d at 984 n.4. Therefore, we affirm the district court's order dismissing the case for lack of jurisdiction.

We also affirm the district court's order substituting the United States in place of Defendant Lamagno. The FTCA provides that if the Attorney General certifies that the defendant employee was acting within the scope of his employment, the United States shall be substituted as the party defendant. 28 U.S.C.A. §2679(d)(1).

The law in this Circuit is clear that such a certification is conclusive. *Johnson v. Carter*, 983 F.2d 1316, 1320 (4th Cir.) (en banc), *cer. denied*, 62 U.S.L.W. 3244 (U.S. 1993). Specifically, we have held that no discretion is given to the district court to review the Attorney General's certification made pursuant to 28 U.S.C.A. §§2679(d)(1), (2). *Johnson*, 983 F.2d at 1319. Thus, the district court lacked discretion to review the United States Attorney's deter-

mination that Lamagno was acting within the scope of his employment at the time of the accident in Colombia. *Id.*

Finding no error, we affirm the district court's orders.<sup>3</sup> We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

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<sup>3</sup>We note that Appellants may yet receive redress for their injuries by virtue of the administrative claim they filed pursuant to 21 U.S.C. §904.

U.S. Supreme Court, U.S.  
FILED  
DEC 13 1994  
OFFICE OF THE CLERK

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1994

*Katia Martinez, Eduardo Martinez Puccini,  
and Henny Martinez de Papaiani,*

Petitioners,

v.

*Dirk A. Lamagno, The Drug Enforcement  
Administration, and the United States of  
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Respondents.

On Writ of Certiorari to the  
United States Court of Appeals for the  
Fourth Circuit

PETITIONERS' BRIEF ON THE MERITS

ISIDORO RODRIGUEZ, ESQ.  
Attorney for Petitioners

Law Offices of  
Isidoro Rodriguez, P.C.  
Calle 84, No. 56-51  
Piso 2, Oficina 4  
Barranquilla, Colombia  
(011)57-58-561678/458273

December 13, 1994

PETITION FOR CERTIORARI FILED JULY 25, 1994  
CERTIORARI GRANTED NOVEMBER 14, 1994

60 PV

## QUESTION PRESENTED

- I. MUST THE DISTRICT COURT CONDUCT DE NOVO REVIEW OF THE ATTORNEY GENERAL'S CERTIFICATION ISSUED UNDER 28 U.S.C. § 2679(d), WHEN FACTS AND INDIVIDUAL FACTORS RAISE NUMEROUS QUESTIONS OF THE CORRECTNESS AND IMPARTIALITY OF THE DETERMINATION OF THE EXECUTIVE OFFICER, AS TO WHETHER ITS EMPLOYEE'S CONDUCT WAS "ACTUATED," AT LEAST IN PART, BY A PURPOSE TO SERVE THE UNITED STATES AT THE TIME OF THE INCIDENT OUT OF WHICH THE CLAIM AROSE?"

## LIST OF PARTIES

The parties that have appeared here include all those listed on the case caption.

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No. 94-167

IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1994

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KATIA GUTIERREZ DE MARTINEZ, EDUARDO  
MARTINEZ PUCCINI, AND HENNY MARTINEZ DE  
PAPAIANI,

Petitioners,

v.

DIRK A. LAMAGNO, THE DRUG ENFORCEMENT  
ADMINISTRATION, AND THE UNITED STATES OF  
AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

PETITIONERS' BRIEF ON THE MERITS

---

OPINIONS BELOW

The opinion of the United States  
Court of Appeal for the Fourth Circuit  
is unpublished (see Petitioners Appen-  
dix, hereinafter "App." 1-b; Joint Ap-  
pendix, hereinafter "JA"-10), but the

decision is noted at 23 F.3d 402 (Table). The judgment of the United States District Court for the Eastern District of Virginia (App. 1-a; JA-9) is unreported.

#### STATEMENT OF JURISDICTION

As a result of injuries and loss of property due to an automobile accident occurring on January 18, 1991, a timely administrative claim was filed on May 5, 1991. Subsequently, within both the State of Virginia and the Federal two year statute of limitation period, a complaint was filed on January 15, 1993. On May 4, 1993, a Notice of Appeal was filed appealing the final order of the District Court of April 16, 1993. The judgment of the Court of Appeals affirming the order of the District Court was entered on April 28, 1994. This Court

has jurisdiction under 28 U.S.C. 1254-(1). The petition for writ of certiorari was filed on July 25, 1994, and granted on November 14, 1994.

#### STATUTE INVOLVED

28 U.S.C. § 2679  
Exclusiveness of remedy

(d)(1) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such

action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. . . .

#### STATEMENT OF THE CASE

Petitioners Mrs. Katia Gutierrez de Martinez, Eduardo Martinez Puccini, and Henny Martinez de Papaiani, (hereinafter "Injured Parties"), are citizens of the Republic of Colombia, who on January 15, 1993, filed in the United States District Court for the Eastern District of Virginia, a Complaint based on diversity of citizenship, against respondent Dirk

A. Lamagno, (hereinafter "Mr. Lamagno"), a Special Agent employed by The Drug Enforcement Administration (DEA), for damages as a result of personal injuries and loss of property, due to an automobile accident occurring in Barranquilla, Colombia, on a Friday night, at 11:45 p.m. on January 18, 1991.<sup>1</sup>

Thus the only issue now before the Court is whether, under the Federal Tort Claims Act, the Attorney General of the United States by certifying to the district court, pursuant to 28 U.S.C. § 2679(d) (1), that a defendant federal employee was acting within the scope of

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<sup>1</sup>The Complaint originally included Counts against the DEA, and the United States, pursuant to the "headquarters exception" to 28 U.S.C. § 2680(k). In addition, judicial enforcement of the right to compensation under 21 U.S.C. § 904, was sought. These Counts were also dismissed by the lower courts. Of the two issues, only the question under 21 U.S.C. § 904, was raised in the Petition for Certiorari, however, the Court did not grant an order to review this second issue.

his federal employment at the time of his allegedly tortious conduct, the United States may insulate the federal employee from all liability, without any independent judicial inquiry in the propriety of the Attorney General's certification.

The Fourth Circuit held that such absolute immunity was required by statute, irrespective of the fact that: (1) Mr. Lamagno works for the Attorney General; (2) the Injured Parties came forward with specific facts, unrebutted by the Government, that demonstrate that the Attorney General's certification was not based on facts and was incorrect; and, (3) the Attorney General certification precluded recovery for the Injured Parties' personal injuries and loss of

property, because of the "foreign country" exception, 28 U.S.C. § 2680(k).<sup>2</sup>

In summary the Injured Parties charged that Mr. Lamagno, negligently caused the accident while driving away from his hotel under the influence of alcohol, late at night after normal working hours, in the company of an unidentified female passenger who was not a federal employee, and in a vehicle identified by non-diplomatic license plates No. LK 9264. (1 Record, Complaint, First Count ¶ 1, ¶ 3 and ¶ 9; 18 Record Transcript of hearing of April 16, 1993, p. 5, line 23; Appellants'

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<sup>2</sup>Although the court of appeals was correct in noting in their opinion that the Injured Parties "may yet receive redress for their injuries," (JA-20), because of their still valid administrative claim filed against DEA pursuant to 21 U.S.C. § 904, the reality is that the Justice Department has for over three and a half years been "sandbagging" this claim since filed on May 5, 1991.

Brief to Fourth Circuit, p. 16, note 5; Joint Appendix to Fourth Circuit A-59)

Furthermore, because of Mr. Lamagno's DWI condition while driving away from his hotel at a high rate of speed he failed to stop at a marked intersection. His armored truck did hit and totally demolished the Injured Parties car. Mr. Lamagno left the Injured Parties trapped in their car for over 45 minutes, unattended and bleeding with numerous physical injuries. (1 Record, Complaint, First Count ¶ 5 and ¶ 16; Second Count ¶ 2; and Third Count ¶ 2)

At the accident Mr. Lamagno, was ordered by the police to appear at a judicial hearing to be held by the 6th Criminal Court on January 19, 1991, and March 7, 1991, and provide testimony re-

garding the accident. (1 Record, Complaint, First Count ¶ 10 and ¶ 15)

However, instead of assuring Mr. Lamagno's appearance at the judicial hearing, officials of the DEA removed the non-diplomatic license plates No. LK 9264, and replaced them with diplomatic license plates No. CD0172. 1 Record, Complaint, First Count ¶ 11; and then instructed Mr. Lamagno not to appear at either of the ordered judicial hearings, and assisting Mr. Lamagno's fleeing of the Republic of Colombia on or about January 19, 1991. (1 Record, Complaint, First Count ¶ 13)

Thus Mr. Lamagno was accused of "careless, reckless, and grossly negligent operation of the motor vehicle." (1 Record, Complaint, First Count ¶ 16)

In response to the Complaint, on March 4, 1993, the United States Attorney issued a Certificate of Scope of Employment under 28 U.S.C. § 2679(d)(1), which only stated the following,

I, . . . , hereby certify that I have investigated the circumstances of the incident upon which the plaintiff's claims were based. On the basis of the information now available with respect to the allegations of the complaint, I hereby certify that defendant Dirk A. Lamagno was acting within scope of his employment as an employee of the United States of America at the time of the incident giving rise to the above entitled action. (JA-1)

The United States' moved to substitute itself for Mr. Lamagno. (JA-3).

The following day, March 5, 1993, based on the above one-paragraph certification of scope of employment, that was the only statement made by the United States, which neither stated any factual basis for its issuance, nor denied nor

rebutted the Injured Parties facts, the District Court entered an ex parte order substituting the United States for Mr. Lamagno (JA-7).

Subsequently, the United States filed a motion under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The United States stated that recovery was not available due to the "foreign country" exception, despite Mr. Lamagno's driving after normal work hours, away from his hotel, under the influence of alcohol, in the company of an unknown female, intentionally failing to appear at two judicial ordered hearings; and, being charged with violations of the Colombian Traffic Code. (9 and 10 Record, Motion of United States to Dismiss. See also Brief of Appellees, 4th Cir. Ct App., pp. 4 and 16)

At a hearing on the United States motion, on April 16, 1993, despite the Injured Parties counsel's argument that,

"...the Government raises what I classify as a James Bond defense: Mr. Lamagno, acting under the influence of alcohol, after hours, and in the company of a woman, was in the scope of his employment. Which [for] James Bond may be good in movies, . . . is not good when it causes severe accidents such as this." (18 Record, Transcript of Hearing p. 5);

the District Court dismissed the action against the United States, based on the "foreign country exemption" under 28 U.S.C. § 2680(k), wherein the United States cannot be subject to suit for any tort committed outside of the United States (JA-9).

In the brief on appeal the Government continued to maintain that the "James Bond Defense" warranted the sub-

stitution of the United States for its DEA agent, since he is on,

"duty twenty four hours a day. A Special Agent does not follow a normal civilian lifestyle while on special assignment in a foreign country." (Brief of Appellees, 4th Cir. Ct App., p. 19)

Despite the undisputed facts surrounding the accident, and the absurdity of the "James Bond Defense", on April 28, 1994, the Fourth Circuit affirmed the District Court's holding on all counts, stating that there is no discretion given to the district court to review the Attorney General's certification. (JA-19).

Because of the Fourth Circuit's absolute immunity holding, which is at odds with the rulings of eight other courts of appeals, and cannot be squared with either the specific wording of 28 U.S.C. § 2679(d)(1)(2) and (3), or the

Congressional intent which becomes apparent from reviewing the legislative history, a Petition for Certiorari was filed seeking review by this Court of the Fourth Circuits holding. Said Petition for review was joined by the Solicitor General.

#### SUMMARY OF THE ARGUMENT

In their Certification of Scope of Employment, neither the Attorney General nor any of her subordinates explained the basis of their certification decision, nor did they rebut, or even acknowledge, any of the proofs presented by the Injured Parties.

By establishing that Mr. Lamagno was driving away from his hotel under the influence of alcohol, late at night after normal working hours, in the company of an unidentified female passenger who was not a federal employee, and in a vehicle identified by non-diplomatic license plates No. LK 9264, the Injured Parties met their burden of proof that Mr. Lamagno was not acting within the scope of his federal employment at the time of the accident.

Thus in holding that the Attorney General's certification under the 28 U.S.C. 2679(d), conclusively requires that the United States be substituted for the government employee as the defendant in all civil actions, and is not subject to de novo judicial review, the Court of Appeals for the Fourth Circuit, is in error not only because of their accepting the absurdity of the Government's "James Bond Defense," but also because their decision is not in accord with either the Federal Drivers Act, or the Westfall Act.

Other circuit courts, in a more reasoned approach than the Fourth Circuit's grant of absolute immunity to federal employees, stress the statutory construction of 28 U.S.C. § 2679(d)(1) vis-a-vis § 2679(d)(2), and place empha

sis on the legislative history of the Westfall Act, to conclude that with exception of the denying the right to review the removal from a State court, the procedure established under the Federal Drivers Act which permitted the District Court to consider facts and circumstances which refute the certification of scope of employment remained unamended.

Accordingly because of the need to protect the public interest by assuring that public funds are not utilized to insure the actions of a federal employee committing tortious conduct while not within the scope of his or her federal employment, independent judicial review is required. This is particularly true given there is nothing either in the Westfall Act nor its legislative history

to lead to the conclusion that for other than removal, Congress did not desire to amend the procedure established under Federal Drivers Act. Thus the Court is respectfully urged to reverse the decision below and mandate that the District Court conduct a de novo review of the "James Bond Defense" and Attorney General's issuance of the certification of scope of employment.

# ARGUMENT

PRIOR TO ORDERING THE SUBSTITUTION OF THE UNITED STATES AS A DEFENDANT FOR A FEDERAL EMPLOYEE NAMED IN A STATE-LAW TORT ACTION, THE DISTRICT COURT MUST PROVIDE AN IMPARTIAL DE NOVO REVIEW AND HEARING ON THE FACTS AND INDIVIDUAL FACTORS INVOLVED SO TO DETERMINE IF THE FEDERAL EMPLOYEES CONDUCT WAS IN FACT ACTUATED, AT LEAST IN PART, BY A PURPOSE TO SERVE THE INTEREST OF THE UNITED STATES.

This Court held unanimously in Westfall v. Erwin, 484 U.S. 292, 300, 108 S.Ct. 580, 585, 98 L.Ed.2d 619 (1988), that consistent with earlier decisions which furthered the policy of promoting effective government, absolute official immunity from state-law tort actions would be available only when the challenged conduct of federal officials is within the outer perimeter of an official's duties and is discretionary in nature. See Spalding v. Vilas 161 U.S. 483, 16 S.Ct. 631, 637, 40 L.Ed.

780 (1896); Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335 (1959).

Subsequently, Congress followed the Court's recommendation to "provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context," Westfall, 108 S.Ct. at 585; by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, (hereafter cited as the "Westfall Act"), Pub. L. No 100-694, 102 Stat. 4563, in which absolute immunity is provided to all federal employees for any state law tort committed, so long as they were found to be acting within the scope of their employment.

Thus if the federal employee was acting within the scope of his employment the United States would be substi-

tuted as the defendant, and the suit would then proceed against the United States under the Federal Torts Claims Act (FTCA), 28 U.S.C. §§ 2671 et seq.

However, Fourth Circuit in interpreting the Westfall Act, in the instant appeal, and in Johnson v. Carter, 983 F.2d 1316, 1320 (4th Cir)(en banc), cert. denied, 1320 U.S.L.W. 3244 (U.S. 1993), did so at odds with the rulings of eight other Circuit Courts of Appeals, by holding that "no discretion is given to the district court to review the Attorney General's certification [of scope of employment] made pursuant to 28 U.S.C.A. §§ 2679(d) (1), (2)" (JA-19).

Thus the Fourth Circuit holding has extended the concept of absolute immu-

nity for all federal employees,<sup>3</sup> beyond that previously established either for Congress in the United States Constitution under Article I, § 6, or for judges through historical precedent ("... absolute [judicial] immunity arising out of judicial proceeding existed at least as early as 1608 in England."). Dissenting opinion Barr v. Matteo, 360 U.S. 564, 579, 79 S.Ct. 1335, 1344 (1959)).

In short, the Fourth Circuit holds that a federal employee is absolutely immune from suit in his individual ca-

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<sup>3</sup>"Federal agency" includes the executive departments, the judicial and legislative branches, the military departments. . . ."

"Employees of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty. . . ., and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation. 28 U.S.C. § 2671.

capacity, whether or not on a temporary duty assignment or at their home station, for all activity during the twenty-four hour of the day, i.e. "James Bond Defense." (See dissenting opinion of Judge Spouse, Carter 983 F.2d at 1324).

This despite the fact that the analysis of the factors supporting the determination of "scope of employment" is not made by an impartial fact finder, but by the Attorney General, who as an appointed official of the Executive Branch is neither a disinterested party, nor independent of political and public pressure.

Fortunately with the exception of the Fourth Circuit, all other Circuit Courts that have addressed the specific question of the reviewability of a dis-

puted scope-of-employment certification issued under the 1988 amendments to 28 U.S.C. § 2679, have uniformly held them to be subject to de novo judicial review.

As the Second Circuit stated in McHugh v. University of Vermont, 966 F.2d 67, 72 (2nd Cir. 1992), "[w]e believe that the scope-of-employment certification should be reviewed de novo for purposes of substituting the United States as a defendant and precluding an action against the federal employee."

In addition to the Second Circuit, seven other Circuit Courts have held that as a rule of law the Attorney General's certification will be reviewed de novo prior to substituting the United

States as a defendant and immunizing the federal employee:<sup>4</sup>

o the First Circuit, see Nasuti v. Scannell, 906 F.2d 802 (1st Cir. 1990);

o the Third Circuit, see Melo v. Hafer, 912 F.2d 628 (3rd Cir. 1990), aff'd on separate grounds, \_\_ U.S. \_\_, 112 S.Ct. 358, 116 L.Ed.2d 301(1991);

o the Sixth Circuit, see Arbour v. Jenkins, 903 F.2d 416 (6th Cir. 1990);

o the Seventh Circuit, see Snodgrass v Jones, 957 F.2d 482 (7th Cir. 1992);

o the Eighth Circuit, see Brown v. Armstrong, 949 F.2d 1007 (8th Cir. 1991);

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<sup>4</sup>Only in Fifth and the Tenth Circuits, where the Westfall Act scope of employment certification was not a disputed issue, has it been held that substitution is automatic and mandatory upon certification, see Mitchell v. Carlson, 896 F.2d 128, 136 (5th Cir. 1990), and Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989).

o the Ninth Circuit, see Meridian Logistics, Inc. v. United States, 939 F.2d 740 (9th Cir. 1991); and,

o the Eleventh Circuit, see S.J. & W Ranch, Inc. v. Lehtinen, 913 F.2d 1538 (11th Cir. 1990).

A. The right to judicial review under the Federal Drivers Act was not amended by the Westfall Act.

The interpretation by the eight Circuit Courts that have dealt with the question of the reviewability of a certification issued under the Westfall Act, holding for judicial review, is consistent with an analysis of the Westfall Act, in conjunction with preexisting statute and case law against which it was enacted.

The Westfall Act amended the 1961 amendments to the Federal Tort Claims Act, Public Law 87-258 [75 Stat

539] (1961), known as The Federal Drivers Act, 28 U.S.C. § 2679 (b)-(c), by which Congress did "provide for the defense of suits against Federal employees arising out of their operation of motor vehicles in the scope of their employment."

Under the Federal Drivers Act, "the trial judge determined the scope of employment issue as a matter of law." Petrousky v. United States, 728 F.Supp 890, 891 (N.D.N.Y., 1984).

Therefore, if the district court found that the federal driver was not acting within the scope of his employment, the United States would not be substituted, and the action would proceed against the federal employee in his individual capacity. Cronin v Hertz Corp., 818 F.2d 1064 (2nd Cir. 1987).

Furthermore, in those actions involving removal from a State court, if the district court found that the federal driver was not acting within his scope of employment the action was to be "remanded to the state court where it is to be recommended against the federal driver in his individual capacity." McGowan v. Williams, 623 F.2d 1239, 1242 (7th Cir. 1980).

The Westfall Act modified the Federal Drivers Act in several respects:

First, absolute immunity for all tort actions was granted to all officers or employees of the executive, judicial, or legislative branches of the United States. 28 U.S.C. §§ 2671 and 2679(b).

Second, 28 U.S.C. §2679(d)(3) added the provision that, if a certification is refused, would allow federal employ-

ees for the first time to petition the court in which the action is pending, state or federal, to find that they were acting within the scope of employment. But see Cronin v Hertz Corp., 818 F.2d 1064 (2nd Cir. 1987), wherein the federal courts already recognized this right of de novo review by the judiciary of the denial of certification in an action not involving removal under the Federal Drivers Act.

Furthermore, in the context of removal, under this section the Attorney General is empowered to remove the action, if in state court, to the district court upon such employee's petition. If the district court finds that the acts were not within the scope of employment, the case is to be remanded to state court.

Third, in 28 U.S.C. § 2679(d)(1), the Westfall Act extended the certification procedure to all cases, including those already in federal court.

Therefore, under the Westfall Act the Attorney General's certification serves two purposes:

First, it is the basis for removal of state court actions to federal court; and,

Second, it is the basis for the substitution of the United States as a defendant and for the resultant immunization of the federal employee.

With regard to removal, 28 U.S.C. § 2679(d)(2), amended existing law by providing that a certification "conclusively establish[es] scope of office or employment for purposes of removal."

In contrast, 28 U.S.C. § 2679(d)(1), which provides for substitution and triggers the preclusive effect of 28 U.S.C. § 2679(b) on the actions against the federal employee, contains no explicit language conferring conclusive status upon the Attorney General's certification. Thus because Congress did not amend the procedures under the Federal Drivers Act, the right to judicial review of the certification was not amended.

This interpretation of the statute not conferring automatic conclusive status upon the Attorney General certification is consistent with the holding in Cronin v Hertz Corp., 818 F.2d 1064 (2nd Cir. 1987), which was the only case located that involved diversity and did not involve removal. There the lower

court undertook judicial review of the denial of certification, based on the question present, which was the vicarious liability of the United States for an automobile accident caused by a civilian employee on temporary assignment (TDY) away from home.<sup>3</sup>

In Cronin, as in the instant appeal the accident occurred late at night after working hours and after the federal employee had a number of alcoholic drinks, but unlike in the instant appeal where the lower courts neither held a hearing nor took notice that Mr. Lamagno

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<sup>3</sup>In the action the civilian federal employee was permanently assigned in Hawaii, but was TDY, taking a training course in Groton, Conn. While on TDY, the federal employee used a Hertz rental car to go bar hopping, and upon returning to his hotel collided with, and killed a motorcyclist. The conservatrix of the estate sued Hertz, Hertz impleaded the federal employee living in Hawaii, the federal employee claimed he was acting within the scope of his employment, and therefore the United States was vicariously liable.

was driving away from his hotel in the company of a female companion not in federal employment, in Cronin, the District Court held a hearing wherein it was established that the employee was on his way back alone to lodging, which was provided by the Government.

Since it was not a removal action, the District Court had no statutory authority to hold a hearing and review the scope of employment issue, but the court did so, and found that the federal employee was not acting within his scope of employment.

On appeal the Second Circuit affirmed, stated that because it could not accept, the "argument that persons on temporary duty are at all times acting solely for the benefit of the employer's benefit, and are always within the scope

of employment. Rather, we look to the facts and to the individual factors involved. . . [Because an] employer who sends an employee away for temporary duty does not automatically become an insurer for all that the employee may do while he or she is away from home." Cronin 818 at 1067.

In Cronin, the "James Bond Defense," was emphatically rejected.

Therefore, the question for the circuit court, in this pre-Westfall Act case, was not whether it had a right to review the denial of the certification, but was whether the federal employee's conduct was "actuated, at least in part, by a purpose to serve the master. Re statement (Second) of Agency § 228(1)-(c)" Cronin 818 at 1067.

Regarding the factors to consider in a case involving an intoxicated federal employee, the circuit court recognized that some acts of a federal employee "even when committed in a state of intoxication may nevertheless be said to be actuated by the interests of the employer." Cronin 818 at 1068.

In its analysis the circuit court considered in those cases where the motivation of the federal employee is difficult to discern, that it would "look next to see whether the risk of this type of accident was foreseeability in such a sense as to make it fair to charge the Government for responsibility" Cronin 818 at 1068.

However, the circuit court stated "that what is reasonable foreseeable in the context of respondent superior is

quite a different thing from the foreseeable unreasonable risk of harm that spells negligence. . . In this sense 'fairness probably cannot be altogether divorced from some kind of foreseeability.' We should, however, look to the 'broadscope of a whole enterprise,' including both its 'more or less inevitable toll' and the harm that is likely to flow from the employer's activity despite the reasonable precautions that might be taken." (citation omitted) Cronin 818 at 1068.

Consequently, under the Federal Drivers Act, judicial review of the certification was the norm, even in non-removal cases.

B. The legislative history of the Westfall Act support continued judicial review of the certification.

As further support of the continued right to judicial review under the Westfall Act, we turn to its legislative history, wherein during the hearing before the House Subcommittee on Administrative Law and Government Relations of the Committee on the Judiciary, Subcommittee Chair Frank, who was the Westfall Act's sponsor, stated that the Act was,

"not going to void the [certification] litigation. It seems to me that certification is a weapon against the employee, not against the plaintiff, because the plaintiff would still have the right to contest the certification if they [sic] thought the Attorney General were [sic] certifying without justification." Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the

Judiciary, 100th Cong., 2d Sess. 60, 128 (April 14, 1988).

Furthermore, even the Department of Justice representative, Deputy Assistant Attorney General Robert Willmore, who appeared at the Congressional hearing confirmed the reviewability of the certification, stating that "Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably by a Federal District Court." Legislation to Amend the Federal Tort Claims Act: Hearing, at 133.

Thus a review of the legislative history, and the Westfall Act itself, fails to present any evidence that Congress intended to eliminate judicial review of the determination of the scope of employment issue, except with regard to removal.

Indeed, such an elimination of judicial review would amount to a violation of the Injured Parties right to due process and equal protection of the laws, since it denies them the right to be heard on the issue of their challenge to the scope of employment, and thereby deprives them of the right to recovery for loss of property and for personal injuries. See St Joseph Stock Yards Co. v United States, 298 U.S. 38, 56 S.Ct. 720, 726 (1936).

This deprivation of due process and equal protection of the laws is obvious, and particularly onerous, since the Westfall Act does now empower the federal employees to challenge a refusal by an Attorney General to certify scope of employment. See 28 U.S.C. § 2679(d)(3).

In the instant action, the DEA raise only the "James Bond Defense," that is Mr. Lamagno as a Special Agent is on duty twenty-four hours a day, (4th Cir. Ct Appeal, Brief of Appellees, p. 4 and p 20). This as noted was rejected by the Second Circuit in Cronin.

Because it has been admitted that Mr. Lamagno was driving away from his hotel, recklessly and under the influence of alcohol, late at night after normal office hours in the company of an unidentified woman, and was charged with a violation of the provisions of the Colombian traffic Code, the United States cannot be automatically substituted as the defendant, and thereby causing Mr. Lamagno to be immunized from suit in his individual capacity.

In fact, by these very admissions, the Injured Parties have more than met their burden of presenting "specific facts rebutting the government's scope of employment certification" Brown v Armstrong, 949 F.2d 1007 at p. 1012 (8th Cir. 1991); Hamrick v. Franklin, 931 F.2d 1209 at 1211 (7th Cir. 1991), and the district court, in accordance with the procedure established under the Federal Drivers Act, was required to conduct at least limited judicial hearing to review the Attorney General's scope-of-employment certification before substituting the United States as defendant.

CONCLUSION

For the reasons given herein, the Court is respectfully requested to reverse the decision of the United States Court of Appeals for the Fourth Circuit, and remand the action to the District Court for a de novo review of the evidence to determine whether Mr. Lamagno is entitled to the Attorney General's certification under the Westfall Act, 28 U.S.C. § 2679(d).

Respectfully submitted,

KATIA GUTIERREZ DE MARTINEZ,  
EDUARDO MARTINEZ PUCCINI,  
AND HENNY MARTINEZ DE PAPAANI,

By: Isidoro Rodriguez  
Isidoro Rodriguez, Esq.  
Attorney for Petitioners

LAW OFFICE OF ISIDORO RODRIGUEZ P.C.  
Calle 84 No. 56-51  
Piso 2, Office 4  
Barranquilla, Colombia S.A.  
(011)5758-561678

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**In the Supreme Court of the United States**

OCTOBER TERM, 1994

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KATIA GUTIERREZ DE MARTINEZ, ET AL., PETITIONERS

*v.*

DIRK A. LAMAGNO, ET AL.

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**BRIEF FOR THE UNITED STATES**

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DREW S. DAYS, III

*Solicitor General*

FRANK W. HUNGER

*Assistant Attorney General*

PAUL BENDER

*Deputy Solicitor General*

JEFFREY P. MINEAR

*Assistant to the Solicitor  
General*

BARBARA L. HERWIG

PETER R. MAIER

*Attorneys*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 514-2217*

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30 PR

### **QUESTION PRESENTED**

Whether the Attorney General's certification under the Westfall Act, 28 U.S.C. 2679(d), that a government employee was acting within the scope of employment conclusively requires that the United States be substituted for the employee as the defendant in a civil action.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1994

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No. 94-167

KATIA GUTIERREZ DE MARTINEZ, ET AL., PETITIONERS

*v.*

DIRK A. LAMAGNO, ET AL.

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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**OPINIONS BELOW**

The opinion of the court of appeals (J.A. 10-20) is unreported, but the decision is noted at 23 F.3d 402 (Table). The orders of the district court (J.A. 7-9) are unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on April 28, 1994. The petition for a writ of certiorari was filed on July 25, 1994, and was granted on November 14, 1994. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

The Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, § 6, 102 Stat. 4564, states in relevant part:

(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment

under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) [sic] of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

28 U.S.C. 2679(d)(1)-(3).

### STATEMENT

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 1402(b), 2401(b), 2671-2680 (1988 & Supp. V 1993), allows suits against the United States for injuries resulting from the negligent or wrongful acts or omissions of federal government employees acting within the scope of their office or employment. See 28 U.S.C. 1346(b), 2672 (1988 & Supp. V 1993). The Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, § 6, 102 Stat. 4564, amended the FTCA to provide that, if a federal employee is sued for a negligent

or wrongful act or omission, and the Attorney General certifies that the employee was acting within the scope of office or employment, the United States shall be substituted as the defendant. See 28 U.S.C. 2679(d). The issue in this case is whether the Attorney General's certification is conclusive for purposes of substitution or whether it is subject to judicial review. The court of appeals followed its prior decision in *Johnson v. Carter*, 983 F.2d 1316, 1319 (4th Cir.) (en banc), cert. denied, 114 S. Ct. 57 (1993), and concluded that, if the Attorney General certifies that the federal employee acted within the scope of employment, the court has "no discretion" to deny substitution.

1. Congress enacted the FTCA in 1946 to provide a federal remedy for claimants alleging tortious injury on account of the actions of federal employees taken within the scope of their employment. Act of Aug. 2, 1946, ch. 753, §§ 401-424, 60 Stat. 842-847. Although the Act waived the United States' sovereign immunity in significant respects, it "did not assure injured persons damages for all injuries caused by such employees." *Dalehite v. United States*, 346 U.S. 15, 17 (1953). The FTCA allows a plaintiff to sue the United States in federal district court

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b).

The FTCA's statutory remedy is subject to specific preconditions and exceptions. For example, the claimant

is not entitled to seek judicial relief unless he "shall have first presented the claim to the appropriate Federal agency" for settlement or adjustment. 28 U.S.C. 2675(a); see 28 U.S.C. 2672 (1988 & Supp. V 1993); *McNeil v. United States*, 113 S. Ct. 1980 (1993). In addition, the claimant may not seek relief against the United States for claims that fall within thirteen enumerated categories, including claims based on the performance of a "discretionary" function, 28 U.S.C. 2680(a); see *United States v. Gaubert*, 499 U.S. 315 (1991); *Dalehite v. United States*, *supra*, and claims "arising in a foreign country," 28 U.S.C. 2680(k); see *Smith v. United States*, 113 S. Ct. 1178 (1993); *United States v. Spelar*, 338 U.S. 217 (1949).

The FTCA incorporates principles similar to the common law doctrine of respondeat superior, which allows a plaintiff to sue a private employer for torts committed by employees acting within their scope of employment. See 5 F. Harper, F. James, Jr., & O. Gray, *The Law of Torts* 1-60 (2d ed. 1986). Under state common law, a plaintiff normally can elect to supplement (or forgo entirely) the respondeat superior remedy by bringing suit directly against the private employee who personally caused the injury. See *id.* at 5. Until 1988, many federal courts had held, however, that the judicial doctrine of official immunity, see *Barr v. Matteo*, 360 U.S. 564 (1959), precluded an analogous state-law tort suit against a federal employee for conduct within the scope of the employee's office or employment. See, e.g., *General Electric Co. v. United States*, 813 F.2d 1273, 1276-1277 (4th Cir. 1987), vacated, 484 U.S. 1022 (1988); *Poolman v. Nelson*, 802 F.2d 304, 307 (8th Cir. 1986).

This Court considered that issue in *Westfall v. Erwin*, 484 U.S. 292 (1988), and rejected the view that federal employees may rely on official immunity whenever they act within the scope of their employment. The Court concluded that "conduct by federal officials must be

discretionary in nature, as well as being within the scope of their employment, before the conduct is absolutely immune from state-law tort liability." *Id.* at 295. The Court reasoned that "[t]he central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature." *Id.* at 296. "It is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of policies of government.'" *Id.* at 297 (quoting *Barr v. Matteo*, 360 U.S. at 571 (opinion of Harlan, J.)).

Congress responded to the Court's decision by enacting the so-called Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563. Congress stated in its legislative findings that judicial rulings, such as the *Westfall* decision, had "seriously eroded the common law tort immunity previously available to Federal employees." § 2(a)(4), 102 Stat. 4563. It found that "[t]he prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the [FTCA] as the proper remedy for Federal employee torts." *Ibid.* Congress accordingly enacted the Westfall Act for the express purpose of "protect[ing] Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." § 2(b), 102 Stat. 4564.

The Westfall Act furnishes that protection by declaring that the FTCA is an "exclusive" remedial mechanism for injuries caused by the tortious conduct of a government employee "acting within the scope of his

office or employment." 28 U.S.C. 2679(b)(1). The Act specifically states that

[a]ny other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

*Ibid.* The Westfall Act ensures that, if a claimant sues the federal employee based on conduct "within the scope of [the employee's] office or employment," the United States will be substituted as the defendant and the suit will proceed against the government under the FTCA. The Act provides as follows:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. 2679(d)(1).

The Westfall Act provides an identical certification procedure for civil actions commenced in state court. 28 U.S.C. 2679(d)(2). In that situation, the Attorney General's certification establishes the basis for both substitution of the United States and removal of the action "to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending." *Ibid.* The Westfall Act provides in that context that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." *Ibid.*

If the Attorney General declines to certify that a federal government employee was acting within the scope of employment, "the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." 28 U.S.C. 2679(d)(3). If the court concludes that the federal employee was acting within the scope of employment, the United States "shall be substituted as the party defendant." *Ibid.*

The Attorney General may delegate certification authority under the Westfall Act to subordinate officers. See 28 U.S.C. 510. The Attorney General has delegated that authority to the United States Attorneys, who make certification determinations in consultation with the Department of Justice. See 28 C.F.R. 15.3(a).

2. Petitioners are citizens of the Republic of Colombia. They allege that on January 18, 1991, Dirk A. Lamagno, a Special Agent employed by the Drug Enforcement Administration (DEA), caused an automobile accident in Barranquilla, Colombia. Lamagno was the driver of a government-owned Ford Bronco that collided with the car in which petitioners were occupants. Petitioners seek general and specific damages for physical injuries and property damage. They filed an administrative claim with the DEA pursuant to Section 709 of the Controlled Substances Act (as amended by the Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 13, 93 Stat. 1048 (1979)), which authorizes settlement of tort claims that "arise in a foreign country in connection with the operations of the [DEA] abroad." 21 U.S.C. 904. The DEA lacked authority to resolve a claim in the dollar amount that petitioners requested and referred the claim to the

Department of Justice. The Department has not made a final administrative decision on that claim. J.A. 11-12.<sup>1</sup>

On January 15, 1993, petitioners filed this diversity action against Lamagno in the United States District Court for the Eastern District of Virginia. See 28 U.S.C. 1332(a)(2). The United States Attorney certified on behalf of the Attorney General that Lamagno was acting within the scope of his office or employment under the Westfall Act, 28 U.S.C. 2679(d), and moved to substitute the United States as the defendant. J.A. 1-6. The district court substituted the United States in place of Lamagno and dismissed him from the action. J.A. 7-8. The United States then moved to dismiss the suit on the ground that the United States has retained its immunity for suits based on "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). The district court granted that motion and dismissed the action. J.A. 9.

The court of appeals affirmed the order of the district court substituting the United States as defendant in place of Lamagno. J.A. 10-20. It held that, under the law of the circuit, a certification by the Attorney General that an employee was acting within the scope of his office or employment at the time of the incident that gave rise to the claim is conclusive and not subject to judicial review. J.A. 19-20. The court relied specifically on its prior decision in *Johnson v. Carter, supra*, which held—over the Justice Department's objection—that once the Attorney General has issued a scope-of-employment certification, the court has "no discretion" to deny substitution. 983 F.2d at 1319-1320.

The *Johnson* decision arose from a traffic violation at the Norfolk Naval Base. Johnson, a civilian member of

<sup>1</sup> The United States has proposed a settlement of petitioners' claims. Petitioners rejected the government's offer on August 31, 1994, and provided a counter-offer.

the Naval Base Security Force, stopped a motorist for speeding, and the motorist complained to her father, a high-ranking naval officer at the base, that Johnson was rude. The naval officer, whose responsibilities included naval base traffic management, contacted Johnson and criticized his conduct. Johnson later sued the naval officer in state court alleging slander and other torts. The federal district court allowed the United States Attorney to remove the action to federal court and substitute the United States as defendant based on the United States Attorney's certification that the naval officer "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(2); see 28 C.F.R. 15.3(a). The en banc court of appeals affirmed that decision, holding that the "plain language" of the Westfall Act gave the district court "no discretion" to deny substitution. 983 F.2d at 1319. The court of appeals panel in this case concluded that the *Johnson* decision was controlling and that the district court here similarly had "no discretion" to question the United States Attorney's certification that Lamagno was acting within the scope of his employment. J.A. 19-20.

The court of appeals also rejected petitioners' challenge to the district court's order dismissing the suit against the United States. J.A. 14-18. As to that issue, the court of appeals concluded that Section 709 of the Controlled Substances Act, 21 U.S.C. 904, did not provide a basis for petitioners' suit, because that provision is not a waiver of sovereign immunity and because it does not provide for judicial review of the Attorney General's actions on tort claims arising in a foreign country. J.A. 15-16. The court of appeals also rejected petitioners' argument that their claim is based on "headquarters" negligence originating in Arlington, Virginia, and therefore is not barred by 28 U.S.C.

2680(k). J.A. 16-18. Those issues are not before the Court. See 115 S. Ct. 507 (1994) (limiting the grant of certiorari to Question 1).

#### SUMMARY OF ARGUMENT

A certification by the Attorney General or her designate under the Westfall Act that a federal employee was acting within the scope of the employee's office or employment is not conclusive on the question whether the United States shall be substituted as the defendant in place of the employee. The Westfall Act does not expressly state that the Attorney General's certification is subject to judicial review. Nevertheless, the most reasonable construction of the Act allows a plaintiff to challenge the Attorney General's certification with respect to substitution.

Under established federal practice, a plaintiff is normally entitled to challenge a motion to join a new party or to substitute a new party for the named defendant. The Westfall Act contains no indication of an intention to deny a plaintiff a similar opportunity to challenge the substitution of the United States. The fact that the substitution in Westfall Act cases is predicated upon the Attorney General's certification does not compel a different result. The courts normally presume that Congress intends judicial review of executive action that falls within the traditional competence of courts to evaluate. That presumption may be appropriately invoked here, where the Attorney General's scope-of-employment certification is submitted to the court in the course of litigation, where the certification has legally binding consequences for the parties, and where it involves an issue—scope of employment—that the courts have traditionally evaluated.

The history, text, and structure of the Westfall Act support that presumption. The Westfall Act was

patterned on prior legislation, the Federal Drivers Act (codified at 28 U.S.C. 2679 (1982)), that contained a similar certification procedure. The courts had routinely reviewed certification decisions under the Federal Drivers Act. The Westfall Act modified that practice with respect to removal, explicitly stating that the Attorney General's certification "shall conclusively establish scope of office or employment for purposes of removal," 28 U.S.C. 2679(d)(2). But the Act is silent on the question whether the Attorney General's certification is conclusive for other purposes. The most reasonable inference is that Congress did not intend the Attorney General's certification to be conclusive on the question of substitution. That result reasonably accommodates the interests of all of the parties. It allows the United States to make the initial determination whether a federal employee was acting within the scope of government employment, while preserving the right of a dissatisfied plaintiff or federal employee to obtain a judicial determination of the matter.

This Court should accordingly reverse the judgment of the court of appeals and remand the case for further proceedings. In urging that result, we do not accept petitioners' unproven allegations regarding the federal employee's conduct in this case, nor do we question the validity of the United States Attorney's scope-of-employment certification. We simply submit that the certification may be challenged in district court.

## ARGUMENT

### THE ATTORNEY GENERAL'S CERTIFICATION UNDER THE WESTFALL ACT THAT A GOVERNMENT EMPLOYEE WAS ACTING WITHIN THE SCOPE OF EMPLOYMENT DOES NOT CONCLUSIVELY REQUIRE THE FEDERAL DISTRICT COURT TO SUBSTITUTE THE UNITED STATES FOR THE EMPLOYEE AS THE DEFENDANT IN A TORT ACTION

This case presents a question under the Westfall Act that has divided the federal courts of appeals. The Fourth Circuit has held in this case and in its en banc decision in *Johnson v. Carter*, 983 F.2d 1316, cert. denied, 114 S. Ct. 57 (1993), that the Attorney General's certification under 28 U.S.C. 2679(d) that a federal employee was acting within the scope of employment conclusively requires a court to substitute the United States as the defendant in place of the named federal employee.<sup>2</sup> Seven other circuits, however, have adopted

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<sup>2</sup> Two circuits have issued decisions that contain language consistent with the Fourth Circuit's position. See *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989); *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990). In *Aviles*, the Tenth Circuit suggested in dicta that the Attorney General's certification should be given conclusive effect on substitution. In that case, however, the complaint itself alleged that the defendants had "act[ed] within the scope of their government employment." 887 F.2d at 1047. *Mitchell* also contains language suggesting that the Attorney General's certification should be given conclusive effect on substitution, see 896 F.2d at 136, but the Fifth Circuit has recently granted a suggestion for rehearing en banc on that question. See *Garcia v. United States*, No. 92-8490. The question is also presented in a petition for certiorari seeking review of another Fifth Circuit decision. See *King Fisher Marine Service, Inc. v. Perez*, No. 94-48.

the approach that we think is correct.<sup>3</sup> They hold that the Attorney General's certification decision is not conclusive on the question of substitution and is subject to challenge in the tort litigation.<sup>4</sup>

**A. The Language Of The Westfall Act Does Not Preclude A Judicial Challenge To The Attorney General's Scope-Of-Employment Certification**

The Fourth Circuit's decision in *Johnson* rests on what the court perceived as the "plain language" of the Westfall Act. 983 F.2d at 1319. The court reasoned that "the language of the statute is clear and unambiguous. If the Attorney General certifies that the defendant employee was acting within the scope of his employment, 'the United States shall be substituted as the party defendant.'" *Id.* at 1320-1321 (quoting with added emphasis 28 U.S.C. 2679(d)(2)). The court concluded that

<sup>3</sup> See *Schrob v. Catterson*, 967 F.2d 929, 935 (3d Cir. 1992); *Brown v. Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991); *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 744-745 (9th Cir. 1991); *Hamrick v. Franklin*, 931 F.2d 1209, 1210-1211 (7th Cir.), cert. denied, 112 S. Ct. 200 (1991); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1543 (1990), modified, 924 F.2d 1555 (11th Cir.), cert. denied, 112 S. Ct. 62 (1991); *Nasuti v. Scannell*, 906 F.2d 802, 812-814 (1st Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).

<sup>4</sup> Immediately after enactment of the Westfall Act, the United States took the position in litigation that the Attorney General's scope-of-employment certifications are conclusive and unreviewable. See, e.g., *Petrousky v. United States*, 728 F. Supp. 890, 891 (N.D.N.Y. 1990). Upon further consideration, the United States changed its position. See Br. for United States in Opp. in *Lehtinen v. S.J. & W. Ranch, Inc.*, cert. denied, 112 S. Ct. 62 (1991) (No. 90-1789); see also Br. for Resp. in Opp. in *Johnson v. Carter*, cert. denied, 114 S. Ct. 57 (1993) (No. 92-1591).

this language gives "no discretion" to the district court. *Id.* at 1319.

As this Court has explained, however, "the meaning of statutory language, plain or not, depends on context." *Brown v. Gardner*, No. 93-1128 (Dec. 12, 1994), slip op. 3; *King v. St. Vincent's Hospital*, 112 S. Ct. 570, 574 (1991). The specific context of the language involved here strongly suggests that a plaintiff may challenge the validity of the Attorney General's certification. The judicial rules governing joinder of parties are commonly phrased in mandatory terms. See, e.g., Fed. R. Civ. P. 19(a) (persons "shall be joined" if certain conditions are met); Fed. R. Civ. P. 24(a) ("anyone shall be permitted to intervene" if certain conditions are met). Parties are nevertheless entitled to challenge joinder on the ground that the legal or factual predicates for adding new parties have not been satisfied, and the federal district courts are responsible for resolving those questions. See Fed. R. Civ. P. 21, 25. See generally 7 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* §§ 1681-1689 (2d ed. 1986).

The Westfall Act does not expressly prohibit courts from resolving analogous disputes over the propriety of substitution under that Act. Congress, which is "predominantly a lawyer's body," *Albernaz v. United States*, 450 U.S. 333, 341-342 (1981), was presumably aware that courts ordinarily determine the existence of the predicates for joinder and substitution when those are challenged by a party to the litigation. Yet the Westfall Act contains no indication that Congress intended to deny the courts their traditional role in this area. Cf. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.").

The Fourth Circuit's construction of the Westfall Act would allow a court to inquire whether the Attorney General has issued a scope-of-employment certification, but it would preclude any inquiry into whether the Attorney General's certification rests on a sound legal or factual foundation. That result is unsound. The Westfall Act does not categorically forbid a court from examining the basis for the Attorney General's certification, and an implication that the Act precludes that inquiry would be inconsistent with the "strong presumption" that Congress normally allows judicial review of executive action. See, e.g., *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-673 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

As a general matter, the question whether a statute allows a judicial challenge is determined from its "express language" and also from "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984). Although the Court normally presumes that Congress intends judicial review, that presumption is not always controlling. See *id.* at 348-352. Furthermore, it applies only to matters within the competence or traditional authority of the courts to decide. See *Department of Navy v. Egan*, 484 U.S. 518, 526-530 (1988); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 588-589 (1943). Nevertheless, the presumption is deeply imbedded in American law.

As this Court noted in *Bowen*, Chief Justice Marshall "laid the foundation for the modern presumption of judicial review" in *United States v. Nourse*, 34 U.S. (9 Pet.) 8 (1835), which recognized that a "distress" warrant issued by the Treasury Department was subject

to judicial challenge. See *Bowen*, 476 U.S. at 670. The Chief Justice stated in *Nourse* that "[i]t would excite some surprise" if the government were able to seize property through executive process and leave the owner with "no remedy, no appeal to the laws of his country." 34 U.S. (9 Pet.) at 28-29. He concluded that "this imputation cannot be cast on the legislature of the United States." *Id.* at 29 (quoted in *Bowen*, 476 U.S. at 670).<sup>5</sup>

The proposition that a plaintiff cannot obtain judicial review of the Attorney General's scope-of-employment certification under the Westfall Act might similarly "excite some surprise." That certification is submitted to a court in response to pending litigation and may have significant, and even dispositive, consequences for the resolution of the underlying claims. The Westfall Act requires that, after substitution, the suit against the United States shall proceed under the FTCA. See 28 U.S.C. 2679(d). In many cases, including this one, substitution of the United States will determine the outcome of the litigation, because the FTCA imposes significant substantive limitations on the types of tort claims that are cognizable against the United States. See 28 U.S.C. 2679(d)(4), 2680; see generally *United States v. Smith*, 499 U.S. 160 (1991). Similar limitations would generally not be applicable if substitution did not occur and the case proceeded against the individual defendant.

The courts, which have a long history of evaluating scope-of-employment issues under the common law, are

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<sup>5</sup> The imputation could not be "cast on the legislature" in that case because Congress had expressly authorized injunctive relief. Act of May 15, 1820, ch. 107, § 4, 3 Stat. 595. *Nourse* nevertheless demonstrates the long lineage of the presumption favoring judicial review. See *Bowen*, 476 U.S. at 670.

fully competent to address the appropriateness of certification. See 5 F. Harper, F. James, Jr., & O. Gray, *The Law of Torts* 23-60 (2d ed. 1986). The issue is not one that has traditionally been reserved to the Executive Branch. Compare, e.g., *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (giving conclusive effect to the United States' suggestion that a head of state possesses sovereign immunity), aff'd in relevant part, rev'd in part, 886 F.2d 438, 441 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990). In these circumstances, it is proper to presume that in the Westfall Act Congress has adhered to its "traditional observance" of a plaintiff's right to obtain judicial review of the government's scope-of-employment certification. See *Bowen*, 476 U.S. at 670.

**B. The History, Text, And Structure Of The Westfall Act Support The Presumption That Congress Intended To Allow A Judicial Challenge To The Attorney General's Scope-Of-Employment Certification**

The presumption of judicial review, "like all presumptions used in interpreting statutes," may be overcome by a "fairly discernible" indication of contrary legislative intent. *Bowen*, 476 U.S. at 673; *Block*, 467 U.S. at 349. No such intent is evident here. To the contrary, the history, text, and structure of the Westfall Act all strongly suggest that a tort plaintiff may contest substitution of the United States through a court challenge to the Attorney General's scope-of-employment certification.

In the first place, the settled law at the time of the enactment of the Westfall Act gave Congress strong reason to expect that the Attorney General's scope-of-employment certifications would be subject to judicial review. At that time, federal district courts routinely examined the question of scope of employment in the

course of determining whether they had jurisdiction over actions against the United States under the FTCA's jurisdictional provision, 28 U.S.C. 1346(b). See, e.g., *Hatahley v. United States*, 351 U.S. 173, 180-181 (1956); *Andrews v. United States*, 732 F.2d 366, 370 (4th Cir. 1984); *Hoston v. Silbert*, 681 F.2d 876, 878-880 (D.C. Cir. 1982); *United States v. Stewart*, 201 F.2d 135, 136-138 (5th Cir. 1953); *King v. United States*, 178 F.2d 320, 321-322 (5th Cir. 1949), cert. denied, 339 U.S. 964 (1950); see also *Armiger et al. Estates v. United States*, 339 F.2d 625, 628-630 (Ct. Cl. 1964) (congressional reference case).

It was also established that courts were able to consider challenges to the Attorney General's scope-of-employment certifications under the Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 28 U.S.C. 2679 (1982)), which served as the model for the Westfall Act. The Federal Drivers Act declared that the FTCA was the "exclusive" remedy for injuries "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C. 2679(b) (1982). It contained a scope-of-employment "certification" procedure, similar to that contained in the Westfall Act, which stated that, upon the Attorney General's certification in a state court action that the employee was acting within the scope of employment, the action "shall be removed" to federal district court and "the proceedings deemed a tort action brought against the United States" under the FTCA. 28 U.S.C. 2679(d) (1982). The district courts routinely resolved challenges to the Attorney General's certifications under the Federal Drivers Act when determining whether the case was properly removed and the United States was properly substituted as the defendant. See, e.g., *Seiden v. United States*, 537 F.2d 867, 869-870 (6th Cir. 1976); *Levin v. Taylor*, 464 F.2d 770, 771 (D.C. Cir. 1972);

*Daugherty v. United States*, 427 F. Supp. 222, 224 (W.D. Pa. 1977).

If Congress had intended to depart from that established practice in the Westfall Act and make the Attorney General's scope-of-employment certifications conclusive on the courts, one would expect that it would have done so explicitly. Congress did, in fact, modify the practice in one specific respect. The Westfall Act included a provision stating:

Th[e] certification of the Attorney General shall conclusively establish the scope of office or employment for purposes of removal.

28 U.S.C. 2679(d) (emphasis added). Congress thus explicitly precluded judicial review of the certification decision with respect to removal. See *Aliota v. Graham*, 984 F.2d 1350, 1355-1356 (3d Cir.) (ruling that a district court may not remand a Westfall Act case to state court, even if it concludes that the scope-of-employment certification was erroneous), cert. denied, 114 S. Ct. 68 (1993). Congress did not state, however, that the Attorney General's certification would also "conclusively" establish the scope of office or employment for purposes of substitution. "[I]t is generally presumed that Congress acts intentionally and purposely," when it "includes particular language in one section of a statute but omits it in another." *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994). It is therefore most natural to conclude that Congress intended in the Westfall Act that the courts would continue to have authority to review scope-of-employment certifications for purposes of substitution. Accord *Keene Corp. v. United States*, 113

S. Ct. 2035, 2040 (1993); *Russello v. United States*, 464 U.S. 16, 23 (1983).<sup>6</sup>

Indeed, Congress in the Westfall Act deliberately expanded the role of the courts with respect to substitution issues. The Westfall Act included provisions, not present in the Federal Drivers Act, allowing a federal employee who failed to obtain a scope-of-employment certification from the Attorney General to "petition the court to find and certify that the employee was acting within the scope of his office or employment." 28 U.S.C. 2679(d)(3). "The Federal Drivers Act, which preceded the 1988 changes, had no such specific provisions." 1 L. Jayson & R. Longstreth, *Handling Federal Tort Claims* 6-56 (1994). The new provisions provide additional and compelling evidence that Congress intended that federal courts would examine the scope-of-employment issue in order to determine the propriety of substituting the United States.

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<sup>6</sup> The legislative history supports the conclusion that Congress intended judicial review of scope-of-employment certifications. During a House committee hearing on the Westfall Act, Representative Frank, a co-sponsor of the bill and chairman of the Subcommittee conducting the hearing, stated his understanding that "the plaintiff would still have the right to contest the certification if they thought the Attorney General were certifying without justification." See *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 128 (1988); see also *id.* at 197. Deputy Assistant Attorney General Robert Willmore, testifying on behalf of the Department of Justice, concurred in that view, stating that "Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably by a Federal District Court." *Id.* at 133. Nothing in the legislative history contradicts that understanding.

A construction of the Westfall Act that includes judicial review of scope-of-employment certifications thus provides a reasonable accommodation of the interests of tort plaintiffs, federal employees, and the United States. If a plaintiff believes that a federal employee committed a tort while acting outside the scope of employment, the plaintiff may sue that employee rather than the United States. See 28 U.S.C. 2679(b). If the Attorney General nevertheless certifies that the employee was acting within the scope of employment, the United States has a conclusive right to remove an action in state court to a federal forum; and for any action in federal court, the United States may substitute itself as the defendant unless the plaintiff shows that certification was unwarranted. See 28 U.S.C. 2679(d)(1) and (2). If the Attorney General refuses to certify that the employee was acting within the scope of employment, the employee may nonetheless petition the court to find and certify that the United States, rather than the employee, is the proper party. See 28 U.S.C. 2679(d)(3).

### **C. The Court Should Remand This Case For Further Proceedings**

The Fourth Circuit's conclusion that the Westfall Act gives the district court "no discretion" to consider petitioners' objection to the Attorney General's scope-of-employment certification rests on the less persuasive of the two possible constructions of the statute. Accordingly, this Court should reverse the court of appeals' judgment and remand the case for further proceedings that would allow petitioners to present their objection to substitution in the district court. In urging that result, we do not suggest agreement with petitioners' assertions respecting Lamagno's conduct, which rest upon the unproven allegations set forth in petitioners' complaint. Nor do we question the correctness of the United States

Attorney's scope-of-employment certification in this case. Contrary to the court of appeals' decision, however, the scope-of-employment certification is not conclusive for purposes of substitution, and it may be challenged by petitioners on remand in the district court.

### **CONCLUSION**

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III  
*Solicitor General*

FRANK W. HUNGER  
*Assistant Attorney General*

PAUL BENDER  
*Deputy Solicitor General*

JEFFREY P. MINEAR  
*Assistant to the Solicitor General*

BARBARA L. HERWIG  
PETER R. MAIER  
*Attorneys*

DECEMBER 1994

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1994

**KATIA GUTIERREZ DE MARTINEZ, ET AL.,**

*Petitioners,*

—v.—

**DIRK A. LAMAGNO, ET AL.,**

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF FOR RESPONDENT DIRK A. LAMAGNO**

ANDREW J. MALONEY, III  
*Counsel of Record*  
KREINDLER & KREINDLER  
*Attorneys for Respondent*  
*Dirk A. Lamagno*  
100 Park Avenue  
New York, New York 10017  
(212) 687-8181

*On the Brief:*

Andrew J. Maloney, III

**BEST AVAILABLE COPY**

**QUESTION PRESENTED**

1. Does the Attorney General's certification that a Government employee was acting within the scope of employment, under the Westfall Act, 28 U.S.C. 2679(d)(1), require that the United States be substituted for the employee as the defendant in a civil action?

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1994

**No. 94-167**

---

KATIA GUTIERREZ DE MARTINEZ, *ET AL.*,  
*Petitioners,*

—v.—

DIRK A. LAMAGNO, *ET AL.*,  
*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

**BRIEF FOR RESPONDENT DIRK A. LAMAGNO**

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**WAIVER OF CERTAIN STATEMENTS**

Respondent, pursuant to Rule 24.2 of this Court, waives its right to present a statement listing the parties, opinions and judgments delivered in the Courts below, as well as statements of jurisdiction and statutes which are required and contained in Petitioners' and the Government's briefs pursuant to Rules 24.1(b), (d), (e) and (f).

## STATEMENT OF THE CASE

### A. Factual Background

Petitioners Katia Gutierrez de Martinez, Eduardo Martinez Puccini and Henry Martinez de Papaiani, citizens of the Republic of Colombia, brought a common law negligence action in the Eastern District of Virginia, against Respondent, Special Agent ("S.A.") Dirk Lamagno of the Drug Enforcement Administration ("DEA"), the DEA, and the United States of America, alleging injuries from an automobile collision with S.A. Lamagno that occurred in Barranquilla, Colombia on the evening of January 18, 1991.<sup>1</sup> It was specifically alleged that S.A. Lamagno negligently caused the automobile collision by speeding and driving while intoxicated. Petitioners further alleged that the accident occurred at night after business hours and that S.A. Lamagno was accompanied by an unidentified female who Petitioners also claim "was not a federal employee" and that they were "driving away from his hotel." (Petitioners' Brief at 7).

Neither the Government nor S.A. Lamagno have ever admitted any of Petitioners' allegations and although the Government never filed responsive pleadings, it denied many of the allegations in its motion to dismiss the Complaint and in opposition to Petitioners' motion to amend the Complaint. The Government offered proof that all DEA personnel working in Colombia are authorized to use DEA vehicles for virtually all travel because of inherent dangers associated with the nature of their work in assisting the Colombian Government in its battle against violent drug cartels. The vehicles

<sup>1</sup> The claims against the DEA and the United States were for the allegedly negligent training of its agents at DEA Headquarters in order to escape the statutory bar of 28 U.S.C. § 2680(k) for torts committed in a foreign country. Petitioners also alleged racial discrimination for the United States' failure to act on their pending administrative claims based on their Latin race denying them due process and equal protection of the laws. These claims were dismissed and all that remains before the Court is the case against S.A. Lamagno.

provided were armor plated with bullet-proof glass.<sup>2</sup> The Government further stated that S.A. Lamagno was returning to his hotel while in Barranquilla, because he was sent there by the DEA from Bogota for temporary duty. (Government's Memorandum in Support of Motion to Dismiss filed March 23, 1993 at 2-3; Government's Reply to Plaintiffs' Opposition to Dismissal, filed April 12, 1993 at 3-4).<sup>3</sup>

Contrary to the suggestion in Petitioners' brief, the police report does not indicate that S.A. LaMagno was speeding or was driving while intoxicated at the time of the accident. The only assertion that S.A. Lamagno was intoxicated is in Petitioners' Complaint, which is based on the assertions of Plaintiff Katia Gutierrez de Martinez, who "detected that [S.A. Lamagno] was under the influence of alcohol." (Petitioners' Complaint ¶ 9). The Complaint however, also alleged that the same Katia Gutierrez de Martinez was rendered unconscious and trapped in the motor vehicle for 45 minutes. (Petitioners' Complaint, ¶¶ 5, 16; Administrative Claim, p. 2, filed May 8, 1991; Petitioners' brief to the Fourth Circuit at 3 and 5).

### B. Proceedings Below

On March 3, 1993, the United States Attorney for the Eastern District of Virginia, Richard Cullen, certified that he had investigated the circumstances of the incident and found that S.A. Lamagno was acting in the scope of his employment for the United States of America at the time of the incident.<sup>4</sup> (JA

<sup>2</sup> Agents and Government employees do not typically obtain their own automobile insurance, leaving them financially exposed for accidents that can occur at any time they are in their vehicles.

<sup>3</sup> Although not specifically argued below, S.A. Lamagno was assigned to the Bogota, Columbia office and was returning from a DEA meeting in Barranquilla accompanied by Julie Bermann, an intelligence analyst for DEA assigned to Columbia for temporary duty. Both DEA personnel attempted to render aid to Petitioners after the collision. After the accident, S.A. Lamagno remained working in Columbia continuously for approximately three years.

<sup>4</sup> The United States Attorneys have been authorized to issue certifications on behalf of the Attorney General. 28 U.S.C. C.F.R. § 15.3(1) (1989).

1-2).<sup>5</sup> The Government then moved to substitute itself for S.A. Lamagno as the defendant pursuant to 28 U.S.C. § 2679(d)(1), commonly known as the "Westfall Act." (JA 3-6). The District Court granted the Government's motion on March 5, 1993 and dismissed the Complaint against S.A. Lamagno. (JA 7-8).

Subsequently, the Government filed a motion to dismiss the Complaint against the DEA and the United States under the foreign country exception to the Federal Tort Claims Act ("FTCA"), pursuant to 28 U.S.C. § 2680(k), which bars suits against the United States for torts committed in a foreign country. The motion to dismiss was argued on April 16, 1993 and the District Court granted the Government's motion on April 20, 1993. (JA 9).

Petitioners appealed on several grounds, including that the Attorney General's certification under § 2679(d)(1) was reviewable and should be overturned. The United States Attorney's Office for the Eastern District of Virginia defended the District Court judgment and argued that the certification was conclusive and not reviewable in the Fourth Circuit. The Department of Justice, which once advocated that position, has inexplicably changed its position and now believes that the certifications are reviewable.

The Fourth Circuit affirmed the dismissal, holding in its relevant part, that the Attorney General's certification under § 2679(d)(1) was conclusive and not reviewable, citing its *en banc* decision in *Johnson v. Carter*, 983 F.2d 1316 (4th Cir.), *cert. denied*, 114 S. Ct. 57 (1993). (JA 10-20).

### SUMMARY OF THE ARGUMENT

Under the Westfall Act, a certification by the Attorney General or her designate that a federal employee was acting within the scope of the employee's office or employment is conclusive and not subject to review. The central purpose of

<sup>5</sup> JA refers to the Joint Appendix filed by Petitioners.

the Westfall Act is to protect federal employees from litigation and judicial intervention by allowing the United States to be substituted as the defendant in place of the employee. Both the plain and unambiguous language of the statute and the purpose underlying the Act, make it clear that the certification by the Attorney General is all that is required to protect federal employees from being sued in their personal capacities.

Congress expressly granted the Attorney General and her designates the power and discretion to examine claims against federal employees to determine their employment status under § 2679(d)(1). The statute mandates that "[u]pon certification by the Attorney General . . . the United States *shall* be substituted as the party defendant." (emphasis supplied). This language is mandatory and does not leave room for a court to review the Attorney General's certification. While Petitioners refer to other subsections of the Act in an attempt to strain the plain language of § 2679(d)(1), those subsections grant different rights addressing different circumstances but do not create an ambiguity in the plain meaning of subsection (d)(1).

While this Court should end its inquiry here, a review of the Westfall Act's legislative history confirms Congress' intent to grant to the Attorney General unfettered discretion to make scope of employment determinations involving the Government's work force, thereby assuring federal employees immunity where appropriate.

Congress clearly and justifiably intended to provide for conclusive certification by the Attorney General, particularly in cases involving federal law enforcement personnel and their confidential operations, both here and abroad. Open inquiry into these matters could endanger the United States and the lives of its employees and agents.

Providing the Attorney General with ability to protect federal employees from personal liability for negligent acts committed in the course and scope of their employment is not a violation of the separation of powers doctrine and does not deny a plaintiff due process and equal protection. Rather, it is the Federal Tort Claims Act ("FTCA") exemptions under 28

U.S.C. § 2680 that leave Petitioners without a jurisdictional foothold and a remedy.

The fact that the Federal Tort Claims Act bars suit against the United States for torts that occurred in a foreign country, does not make for a constitutional infirmity in the certification provisions of the statute.

This Court should accordingly affirm the judgment of the Court of Appeals in the Fourth Circuit and rule that the Attorney General's certification under § 2679(d)(1) is not reviewable.

### ARGUMENT

#### THE ATTORNEY GENERAL'S CERTIFICATION UNDER THE WESTFALL ACT ESTABLISHES THAT THE GOVERNMENT EMPLOYEE WAS ACTING IN THE SCOPE OF HIS EMPLOYMENT AND DICTATES AUTOMATIC SUBSTITUTION OF THE UNITED STATES FOR THE EMPLOYEE AS THE DEFENDANT IN ANY TORT ACTION

This case presents a question under the Westfall Act that has divided the federal courts of appeals. The Fourth Circuit has held in this case and in its *en banc* decision in *Johnson v. Carter*, 983 F.2d 1316 (4th Cir.), *cert. denied*, 114 S.Ct. 57 (1993), that the Attorney General's certification under 28 U.S.C. 2679(d) that a federal employee was acting within the scope of employment requires a court to substitute the United States as the defendant in place of the named federal employee. The Fifth and Tenth circuits have ruled similarly.<sup>6</sup> Eight other circuits have adopted various degrees of the opposite position.<sup>7</sup> Those circuits hold that the Attorney General's

<sup>6</sup> See *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989); *Mitchell v. Carlson*, 896 F.2d 128, 136 (5th Cir. 1990).

<sup>7</sup> Immediately after enactment of the Westfall Act, the United States took the position in litigation that the Attorney General's scope-

certification is not conclusive on the question of substitution, under § 2679(d)(1), nor on the question of removal, under § 2679(d)(2) and is subject to challenge by plaintiffs in tort litigation.<sup>8</sup>

#### A. The Plain And Unambiguous Language Of The Westfall Act Requires Substitution After Certification And Does Not Empower A Court To Review The Certification.

When the terms of a statute are plain and unambiguous, judicial inquiry is complete, except in rare circumstances, and this Court should assume that the legislative purpose is expressed by the ordinary meaning of the words used. *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1169-73 (1993) (court in referring to dictionary definitions held "conduct" and "participate" meant taking part in directing or controlling a Rico enterprise even under the liberal construction rule that Congress intended); see also, *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *United States v. James*, 478 U.S. 597, 606 (1986); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

Subsection (d)(1) of the Westfall Act uses plain and unambiguous language. The word "shall" is plain and clearly

of-employment certifications were conclusive and unreviewable; since 1990 it has argued to the contrary. See e.g., *Arbour v. Jenkins*, 713 F.Supp. 229, 230 (E.D. Mich. 1989), *reversed* 903 F.2d 416 (6th Cir. 1990); *S.J. & W. Ranch, Inc. v. Lehtinen*, 717 F.Supp. 824 (S.D. Fla. 1989) *reversed* 913 F.2d 1538 (1990); *Petrusky v. United States*, 728 F.Supp. 890, 891 (N.D.N.Y. 1990).

<sup>8</sup> See *McHugh v. University of Vermont*, 966 F.2d 67, 73-75 (2d Cir. 1992); *Schrob v. Catterson*, 967 F.2d 929, 935 (3d Cir. 1992); *Brown v. Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991); *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 744-745 (9th Cir. 1991); *Hamrick v. Franklin*, 931 F.2d 1209, 1210-1211 (7th Cir.), *cert. denied*, 112 S.Ct. 200 (1991); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1543 (1990), *modified*, 924 F.2d 1555 (11th Cir.), *cert. denied*, 502 U.S. 813 (1991); *Nasuti v. Scannell*, 906 F.2d 802, 812-814 (1st Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).

mandatory. It is a word of command.<sup>9</sup> In ordinary usage it means "must" and is inconsistent with the concept of discretion. *Johnson*, 983 F.2d at 1319-21 (the meaning of "shall" is plain and unambiguous giving no discretion to the district court in requiring substitution); *Aviles*, 887 F.2d at 1048-49 (mandatory language of § 2679(d) does not permit challenge to Attorney General's certification); *Mitchell*, 896 F.2d at 130-31 (district courts do not have power to review certification; substitution is required).<sup>10</sup>

This Court has further addressed an almost identical issue involving the Westfall Act and the Gonzalez Act, 10 U.S.C. § 1089, in *United States v. Smith*, 499 U.S. 160 (1991). The Government substituted itself for a military doctor accused of committing malpractice while stationed in Italy. The Ninth Circuit had held that neither the Gonzalez Act nor the Westfall Act required substitution of the Government or otherwise immunized the doctor, because the FTCA did not provide a remedy due to the foreign tort exception under § 2680(k). In reversing the Ninth Circuit, this Court held that "§ 6 [of the Westfall Act] directs the Attorney General in appropriate tort cases to certify that a Government employee named as defendant was acting within the scope of his employment when he committed the alleged tort." *Smith* at 166. This Court further held that "Congress recognized that the *required* substitution of the United States as the defendant in tort suits filed against

<sup>9</sup> See also Black's Law Dictionary's definition of "shall" at 1375 (Sixth Edition 1990); Webster's Collegiate Dictionary, at 1075 (Tenth Edition 1993).

<sup>10</sup> See e.g., criminal cases directing courts to act using the word "shall;" *Smith v. United States*, 113 S.Ct. 2050, 2057-60 (1993) (18 U.S.C. § 924(c) requires a mandatory minimum sentence of five years; no discretion); *Chapman v. United States*, 500 U.S. 453, 463-64 (1991) (21 U.S.C. § 841 narcotics statute required courts to include the weight of the carrier medium for LSD to determine a mandatory minimum sentence; no discretion); *United States v. Posner*, 868 F.2d 720, 724 (5th Cir. 1989) (F.R.Crim.P. 32(a)(1)(c) "the Court *shall* address the defendant" at a sentencing to determine if defendant wishes to make a statement and failure to do so is error) (emphasis supplied).

Government employees would sometimes foreclose a tort plaintiff's recovery altogether." *Id.* (emphasis supplied). This Court reversed the Ninth Circuit which had held the substitution was not required. Finding no ambiguities in the Westfall Act, despite a challenge by respondent-plaintiff to other perceived ambiguities in the statute, the *Smith* Court ruled that the Act's language was plain and clear and that the scope of the employment issue was, pursuant to the statute, for the Attorney General to decide. *Id.* at 160, 173.

Petitioners and several courts of appeals have asserted that when subsection (d)(1) of the Westfall Act is compared to (d)(2) of the Act, which governs removal of cases, an ambiguity is created in subsection (d)(1). Petitioners assert that because subsection (d)(2) specifies that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal," the mere absence of such language in the text of subsection (d)(1), compels an opposite conclusion.

This argument ignores the fact that subsection (d)(1) is clear even without the clause found in subsection (d)(2). Petitioners' assertions of ambiguity do not transform this clear statute into an ambiguous provision. *TVA v. Hill*, 437 U.S. 153, 173 n.18 (1978); see also *James*, 478 U.S. at 604-05 (1986).

A more valuable comparison is that between subsection (d)(2) and the old § 2679(d) (1982), known as the Federal Drivers Act, which in its pertinent part read:

Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

Subsection (d)(2) of the new § 2679, the Westfall Act, has specifically repealed the language above by not only deleting it but by specifically adding that the Attorney General's

certification makes the removal to federal court conclusive. The Courts once had the ability to review the Attorney General's certification and order a remand of the case to state court; now they do not. *Egan by Egan v. United States*, 732 F. Supp. 1248, 1251-52 (E.D.N.Y. 1990) *but see, McHugh*, 966 F.2d 67; *See also Mitchell*, 896 F.2d at 130.

Some courts, supporting Petitioner's arguments, contend that they can review the scope of the employment question after the Attorney General's certification, find that the certification is invalid, and remand the case to state court. *See, e.g., McHugh*, 966 F.2d at 73 (citations omitted). A remand by the district court after the Attorney General has certified, however, is a clear violation of subsection (d)(2)'s mandatory language that the certification is conclusive. If the district court can review and remand, the language of "conclusive . . . for purposes of removal" would be inconsistent and meaningless. *Salomon v. Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991); *Aviles v. Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1990); *Jackson v. Neuger*, 783 F.Supp. 558, 559-60 (D. Colo. 1992); *Egan*, 732 F.Supp. at 1251-52.

Some courts have taken the inconsistent middle ground and have held that the removal after certification is unreviewable but the court can still review certification, find it invalid, but nevertheless retain subject matter jurisdiction for the case in federal court. *See e.g., Aliota v. Graham*, 984 F.2d 1350, 1357 (3d Cir.), *cert. denied* 113 S. Ct. 68 (1993). This position makes little sense, the logical intention, as reflected by the language in both (d)(1) and (d)(2), was to make the certification conclusive for *all* purposes. After removal upon certification, the Attorney General does not then have to certify again for substantive purposes under (d)(1), nor can the Attorney General then decide not to certify because once the initial certification has taken place, it becomes conclusive for both removal and substitution. *Salomon* at 1143; *Aviles* at 1049; *Jackson* at 559-60; *Egan* at 251-52.

The conclusive effect of subsection (d)(1) is further confirmed by the fact that the Westfall Act expressly articulates when a court *can* review the scope of the employment issue. Subsection (d)(3) expressly states that if the Attorney General refuses to certify:

*the employee may . . . petition the court to find and certify that the employee was acting in the scope of his office or employment . . . [and] [i]f . . . the district court determines that the employee was not acting within the scope . . . the action shall be remanded to the State court.*

(emphasis supplied). Noticeably absent is any provision for a plaintiff to seek judicial reversal of a certification by the Attorney General. This omission is telling.

[W]here Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.

*Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Plaintiffs may not like this scheme, but this Court has itself noted that Congress gave "considerably less solicitude for tort plaintiffs' rights" in passing the Westfall Act. *Smith*, 499 U.S. at 175. It is not the province of the courts to question this policy determination.<sup>11</sup>

Finally, subsection (d)(4) of the Westfall Act further confirms the mandatory nature of substitution in each of the Act's subdivisions by stating "Upon certification . . . [under] paragraph (1), (2), or (3) [the action] *shall* proceed in the same manner as any action against the United States . . ." (emphasis supplied).

<sup>11</sup> If the Attorney General's certification was not intended to be conclusive for all purposes, then Congress would not have mentioned the Attorney General or certification at all.

The language of the Westfall Act is repeatedly clear using the word "shall" no less than seventeen times, requiring district courts to comply with the mandatory and restrictive procedures for immunizing federal employees. The Westfall Act was intended to be read in conjunction with the sovereign immunity waiver that Congress has granted under the FTCA and its restrictive sister statutes. *See, e.g., Lehman v. Nakshian*, 453 U.S. 156, 160-161 (1981) (conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto under the FTCA and its accompanying statutes are not to be implied but must be unequivocally expressed).

**B. The Legislative History Of The Act Supports The Conclusive Effect Of The Attorney General's Certification.**

This Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), appeared to erode the immunity from liability of federal employees acting in the scope of their employment, by requiring that they be found to have engaged in the exercise of some discretionary function before receiving immunity from personal liability. Congress subsequently passed the Westfall Act to restore the broad immunity of federal employees, while enhancing the Attorney General's ability to swiftly immunize federal employees in appropriate cases. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988, Section 2 ("the Act").

Congress' intent in the Westfall Act was to minimize the burden on federal courts and employees. It feared that the Court's decision in *Westfall* would require a time consuming "fact-based determination" of whether the federal employee was exercising Governmental discretion. H.R. No. 700, 100th Cong., 2d Sess. 2 (1988), *reprinted* in 1988 U.S. Code Cong. Admin. News 5946 ("House Report"). The House Report further indicated that the bill would amend § 2679(d) to:

*require* the United States to be substituted . . . *whenever* the Attorney General determines that the [relevant] act

. . . was within the scope of the employee's office or employment. *Once made, this determination would also require* that any case filed in State Court be removed to a Federal district court.

House Report at 5952, section 6 (emphases supplied). The language above clearly indicates an intention to delegate solely to the Attorney General<sup>1</sup>, the role of making scope of employment determinations, regardless of whether the certification is made under subsection (d)(1) for actions filed in federal court, or subsection (d)(2) for actions filed in a state court.

Similarly, members of the United States Senate were concerned that *Westfall* created "insecurity and uncertainty among Federal employees, [and] that it [would] place an enormous litigation burden on the Department." 1988 WL 177191, Proceedings and Debates of the 100th Congress, 2d Session, October 11, 1988 at 1. The new § 2679 addresses both concerns, by (1) making irrelevant any inquiry into the discretionary nature of the function performed by the employee; thereby providing security and certainty among federal employees; and (2) delegating the certification issue to the Attorney General. The benefit to the employee is not only immunity from personal liability, but also protection from lengthy and uncertain litigation. *See Mitchell* 896 F.2d at 133.

Petitioners and several circuits have, however, cited an April 13, 1988 Congressional Subcommittee Hearing at which Congressman Barney Frank surmised that a "plaintiff would still have the right to contest the certification if they [sic] thought the Attorney General were [sic] certifying without justification." Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committees on the Judiciary, 100th Cong., 2d Sess. 60, 128 (April 14, 1988). A similar statement was made during the hearings by Deputy Assistant Attorney General Robert Willmore. However, while the beliefs and understandings of Congressman Frank and

Deputy Assistant Attorney General Willmore are interesting, they do not amount to the legislative intent of Congress.

In addressing the House Report, Judge Nickerson in *Egan*, 732 F.Supp. at 1252 stated:

The Report is cited not to show "legislative intent." i.e., what the members of Congress who adopted the Act had in mind. There is manifestly no such thing. No one knows, or can know, what the mental state of each of the legislators was, or what concerns, important or trivial or perhaps even irrelevant to the announced purpose of the legislation, motivated their votes. Moreover, it is fatuous to suppose that there is a composite group intention of the legislators.

(citations omitted).

The Fifth Circuit in *Mitchell*, 896 F.2d at 136 held that:

Isolated language found scattered throughout the legislative history is insufficient persuasion that Congress intended to frustrate the very purpose of the Westfall Act, to protect its employees from the distraction and burden of litigation based upon their employment activities. If there is a policy defect in the statute, it is in a failure of Congress to have waived sovereign immunity broadly enough, not in a failure to protect employees in all of their course-of-employment activities.

While Petitioners and the Government cite isolated statements that were made in early deliberations over the bill that became the Westfall Act, no such statements were made several months later when the Act was passed, nor did accordant language make it into the statute itself. The most reliable indicators of Congressional intent are the Reports of the two Houses of Congress. Those reports confirm their intent to make the Attorney General's determination conclusive and nonreviewable.

**C. The Westfall Act Is Constitutionally Sound And The Conclusive Effect Given To The Attorney General's Certification Does Not Violate The Due Process, Equal Protection Or Separation Of Powers Clauses.**

Congress has the power to enact legislation that determines when courts have jurisdiction and when plaintiffs have a remedy against the United States. U.S. Const. Art. I, § 1; *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (statutory grant of jurisdiction is narrower than the constitutionally permissible jurisdictional allowance); *Smith*, 499 U.S. at 166 (plaintiffs may be left without a remedy under the FTCA by virtue of §§ 2680(k) and 2679). Congress recognized that the exceptions under the FTCA 28 U.S.C. § 2680 "would sometimes foreclose a tort plaintiff's recovery altogether." *Smith*, 499 U.S. at 166. Petitioners seek to circumvent the holding in *Smith* by arguing that unless the Attorney General's certification is reviewable under the Westfall Act, they will be deprived of due process because they will ultimately be foreclosed from a remedy under § 2680(k) for their foreign tort claim.

The Westfall Act, Subsection (d)(1) does not "deprive" Petitioners of their ability to bring an action, only their ability to bring it against S.A. Lamagno. Where there is no deprivation, no due process is required. It is § 2680's exceptions of the FTCA that deprive Petitioners of a remedy.<sup>12</sup>

It is undisputed that Congress has the power to foreclose a plaintiff from recovering in an action against the United States for negligence committed in a foreign country. *Smith*, 499 U.S. at 166. Therefore, whether certification under § 2679(d) is the initial vehicle in barring that recovery is irrel-

<sup>12</sup> The Due Process clause is not implicated by the negligent acts of Government officials for unintended loss or injury because it does not "deprive" a person of life, liberty or property via an abusive Government power. *Daniels v. Williams*, 474 U.S. 327 (1986). In addition, Congress has provided for a procedure in which an injured party may recover damages in limited circumstances under the FTCA.

evant, Petitioners' due process attack is in reality, an attack on the foreign tort exception under the FTCA. It is only when the FTCA bars a recovery against the United States that plaintiffs have challenged the certification in an attempt to expand the potential for recovery beyond the FTCA.<sup>13</sup>

To demonstrate a deprivation of due process rights, Petitioners' must demonstrate that the Congressional mandate of § 2679(d) was wholly arbitrary and irrational in purpose and effect, see *Pension Benefit Guaranty Corp. v. R.A. Fray & Co.*, 467 U.S. 717, 728-34 (1984); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 n.32 (1978) (otherwise settled expectations may be changed by legislative action). They have failed to do so.

In passing the Westfall Act, Congress weighed the interest of the United States and its employees, against the interests of prospective plaintiffs, and in favoring the former two, designed a stream-lined approach to resolving the scope of employment issue with little litigation and delay. Congress explicitly stated its intent to restrict a plaintiff's remedies in order to prevent the "substantial diminution in the vigor of federal law enforcement and implementation." House Report at 3, U.S. Code Cong. & Admin. News 1988, pp. 5945, 5947. In so doing, Congress has provided ample justification and a rational purpose for treating all plaintiffs' suits in the same manner when the action is against the United States or an employee acting on its behalf, and accordingly does not violate equal protection or substantive due process.

This Court in *Block v. Community Nutrition Institute*, 467 U.S. 340, 349-51 (1984), denied the consumers of dairy products the ability to obtain judicial review of milk market orders. The *Block* Court ruled that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be

<sup>13</sup> Petitioners still have a remedy under 21 U.S.C. § 904 from the DEA.

impliedly precluded." *Id.* at 349 (citation omitted). Likewise under the Westfall Act, Congress considered who should be entitled to judicial review and when they should receive it under subsection (d)(3); Congress concluded that the employee not the plaintiff can petition for review if the Attorney General refuses certification.

In *Morris v. Gressette*, 432 U.S. 491, 504-05 (1977), this Court held that the Attorney General's action under the Voting Rights Act of 1965 was an unreviewable determination. "Congress had intended the approval procedure to be expeditious and that reviewability would unnecessarily extend the period the State must wait for effecting its change." *Id.* at 504-05.

So too has Congress under the Westfall Act, precluded judicial review of the Attorney General's certification in response to the decision in *Westfall v. Erwin*. Any "presumption favoring judicial review [is] overcome, whenever the Congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *Block*, 467 U.S. at 351 (citation omitted).

Petitioners contend that the conclusive effect of the Attorney General's certification violates the separation of powers clause. However, Congress can delegate certain powers to both the Executive and Judicial Branches of Government. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (establishing sentencing commission to enact sentencing guidelines was not an improper delegation of legislative authority or a violation of separation of powers); *Kahn v. Hart*, 943 F.2d 1261 (10th Cir. 1991) (President empowered to prescribe limits on punishment in military court martials); *Haige v. Agee*, 453 U.S. 280 (1981) (Secretary of State empowered to revoke passport from a United States citizen under certain circumstances that may effect national security or foreign policy); *INS v. Doherty*, 502 U.S. 314 (1992) (Attorney General has broad discretion in alien deportation proceedings).<sup>14</sup>

<sup>14</sup> See also, *Thomas v. Union Carbide Agriculture Prod. Co.*, 473 U.S. 568 (1985) (pesticide regulation and compensation pursuant to Act

Congress explicitly contemplated the effect of the Westfall Act in conjunction with the Federal Tort Claims Act, with the specific design and rational purpose of protecting federal employees and can delegate discretion to the Attorney General. The Westfall Act is a constitutionally sound sister statute to the FTCA.

#### D. Policy Rationale

The reliance of Petitioners and the Government on "assumptions" of traditional judicial review under various Rules of Civil Procedure is unavailing. Each of the Rules cited explicitly grants courts the power to review when new parties should become part of a case.

These general rules can never serve to defeat the specific language of the Westfall Act. Even if it could be said that their general terms conflict with the specific language in the Westfall Act, the latter must govern under established rules of statutory construction.

All "assumptions" in favor of judicial review that may exist in traditional litigation simply do not apply when the United States or its employees are sued. Congress has carefully enacted legislation that carves out specific procedures,

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vesting powers of review to arbitration board); *Wade v. United States*, 112 S.Ct. 1840, 1843 (1992) (prosecutor's discretion not to file a 5K1.1 motion to reduce a criminal defendant's sentence based on substantial assistance, is reviewable only in the rare showing of an unconstitutional motive on the part of the prosecutor); *United States v. Batchelder*, 442 U.S. 114 (1979) (prosecutorial discretion in choosing which of several applicable charges to prosecute and when); *Touby v. United States*, 500 U.S. 160 (1991) (Attorney General given discretion to temporarily set narcotics schedule defining criminal conduct was guided by an intelligible Congressional principle); *United States v. Bozarov*, 974 F.2d 1037 (9th Cir.), cert. denied, 113 S.Ct. 1273 (1993) (no judicial review of Secretary of Commerce's discretion to determine items on commodities control for export list under the Export Administration Act); *National Federation of Federal Employees v. United States*, 905 F.2d 400 (D.C. Cir. 1990) (Secretary of Defense and committee empowered to determine which military bases to close was not reviewable).

requirements and exemptions when plaintiffs sue a Government employee and/or the United States itself. *Lehman*, 453 U.S. at 160-61 (conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied but must be unequivocally expressed). Congress did not expressly or implicitly grant Courts the power to determine if a federal employee was acting in the scope of his or her employment under the Act, except in a situation where the Attorney General refuses to certify and the employee petitions the Court to review that refusal. To interpret the Westfall Act as permitting Petitioners to challenge the Attorney General's certification before a Court makes law out of what Congress has *not* said. See e.g. *In Re Szafranski*, 147 B.R. 976 (N.D. Okla 1992).

There is a sound policy rationale for the conclusive effect afforded to the Attorney General's certification by the Westfall Act. This action, where Petitioners seek a hearing that would force disclosures about the operations of the DEA Special Agents engaged in semi-covert operations in South America, is the perfect vehicle for examining that rationale. Disclosures in such a hearing could be devastating or even fatal, especially since it is not clear whether the issue would be decided by a judge or jury. See e.g. *Brown v. Armstrong*, 949 F.2d 1007, 1011 (8th Cir. 1991) (examining scope of employment issue raises questions as to whether a judge or jury decides the issue).

More practically, if judicial review is allowed, conflicts will arise as to what law governs scope of employment for this issue. Federal employees who operate under a common employment mandate should not be subject to the vagaries of the disparate laws that may apply to their cases. Congress anticipated these problems and in relieving the courts of burdensome litigation on these issues, empowered the Attorney General with conclusive discretion to make a determination about a federal employee's scope of employment.

**CONCLUSION**

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Dated: New York, New York  
January 30, 1995

Respectfully submitted,

Andrew J. Maloney, III  
*Attorney for Respondent*  
*DIRK A. LAMAGNO*  
KREINDLER & KREINDLER  
100 Park Avenue  
New York, New York 10017  
(212) 687-8181

No. 94-167

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1994**

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**KATIA GUTIERREZ DE MARTINEZ, ET AL., PETITIONERS**

**v.**

**DIRK A. LAMAGNO, ET AL.**

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**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**REPLY BRIEF FOR THE UNITED STATES**

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**DREW S. DAYS, III**  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 514-2217*

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**In the Supreme Court of the United States**

OCTOBER TERM, 1994

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No. 94-167

KATIA GUTIERREZ DE MARTINEZ, ET AL., PETITIONERS

v.

DIRK A. LAMAGNO, ET AL.

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**REPLY BRIEF FOR THE UNITED STATES**

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1. Respondent and amicus Kellogg place principal reliance on the Westfall Act's provision that upon the Attorney General's issuance of a scope certification, a civil suit against a federal employee "shall be deemed an action against the United States" under the Federal Tort Claims Act (FTCA), "and the United States shall be substituted as the party defendant." 28 U.S.C. 2679(d)(1). See Resp. Br. 7-12; Kellogg Amicus Br. 8-15. Respondent and his amicus rely heavily on the Act's use of the term "shall" as precluding judicial review. See, e.g., Amicus Br. 4, 8-9. The pivotal issue here, however, is under what conditions the action "shall" be deemed an "action against the United States." The amicus contends that the only predicate for substitution is the

act of certification itself, without regard to whether the certification is properly grounded in law and fact. *Id.* at 10. That contention is inconsistent with the "strong presumption" that courts are entitled to examine the basis for executive action. See, e.g., *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-673 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).<sup>1</sup>

Respondent and his amicus, moreover, fail adequately to address the implications of 28 U.S.C. 2679(d)(2), which applies to tort suits brought in state court against federal employees. Section 2679(d)(2) provides that upon

<sup>1</sup> In *Wade v. United States*, 112 S. Ct. 1840 (1992), this Court considered statutory and Sentencing Guidelines provisions that authorize a federal court to impose a criminal sentence below the statutory minimum, and below the Guideline range, "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." Sentencing Guidelines § 5K1.1; see also 18 U.S.C. 3553(e). Although both the statute and the Guidelines require a "motion of the government" as a condition precedent to downward departure, and although neither provides expressly for judicial review of the government's refusal to file such a motion, this Court unanimously held that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion." 112 S. Ct. at 1843-1844. The scope of judicial review in that context was restricted to constitutional claims, see *id.* at 1844, a limitation grounded in the Court's recognition that under the statute and Guidelines the prosecutor retains the discretion to decline to file a motion even where the defendant has rendered substantial assistance, *id.* at 1843. Here, by contrast, the Attorney General can issue a certification only if she determines that the defendant acted within the scope of his or her employment—a determination based upon an established body of law that courts are well equipped to apply.

certification, such a suit "shall be removed" to the appropriate federal district court; that the suit "shall be deemed to be an action or proceeding brought against the United States" under the FTCA; and that "the United States shall be substituted as the party defendant." Section 2679(d)(2) then states that "[t]his certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal" (emphasis added). That language strongly implies that the certification is *not* conclusive with respect to the substitution of the United States as party defendant.

Amicus Kellogg contends that the final sentence of Section 2679(d)(2) was included out of an abundance of caution, on the theory that courts would be likely to scrutinize with particular care the basis for their own jurisdiction. See Amicus Br. 14 ("Removal—because it concerns the jurisdiction of the court—is most likely to spark *de novo* judicial review."). However, in cases in which the Attorney General's scope certification is sustained—which, in the view of the amicus, must be every case where a certification is issued—the suit before the district court will be one against the United States under the FTCA. It is altogether implausible to suppose that a federal district court would doubt the basis for its jurisdiction over such a suit. See 28 U.S.C. 1346(b). Any uncertainty as to the propriety of federal jurisdiction—and any consequent need to clarify that the scope certification conclusively establishes scope of employment for purposes of removal—could arise *only* in cases in which the individual defendant is resubstituted for the United States after judicial review of the certification. Yet under the construction of the statute

proffered by respondent and his amicus, no such cases can arise.<sup>2</sup>

2. As we noted in our opening brief (Br. 19-20), the authority of federal district courts to review the Attorney General's scope certification under the Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (codified at 28 U.S.C. 2679 (1982)), was well established. Amicus Kellogg correctly observes (Amicus Br. 16-17) that the Drivers Act directed the district court to remand a case removed from state court if it determined that the case

<sup>2</sup> This is not a case in which judicial review will interfere with the exercise of Executive Branch discretion or involve the courts in questions that they are ill suited to resolve. The Westfall Act does not empower the Attorney General to develop her own criteria for determining whether an individual employee should be subject to suit in a particular instance. Rather, substitution of the United States pursuant to the certification procedure must be based on the Attorney General's determination that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1) and (d)(2). The scope of employment determination, moreover, is to be based on "the law of the place where the act or omission occurred." 28 U.S.C. 1346(b); see, e.g., *Williams v. United States*, 350 U.S. 857 (1955); *Flechsig v. United States*, 991 F.2d 300, 302 (6th Cir. 1993); *Schrob v. Catterson*, 967 F.2d 929, 934 (3d Cir. 1992); *Robbins v. United States*, 722 F.2d 387, 388 (8th Cir. 1984); H.R. Rep. No. 700, 100th Cong., 2d Sess. 5 (1988). Because the certification process primarily involves the application of an established body of law, rather than the exercise of discretion or policy judgment, judicial review of the Attorney General's decision creates no undue risk of interference with Executive Branch prerogatives. The question whether particular conduct falls within the scope of an individual's employment is also well suited for judicial resolution, since it is routinely addressed by courts in their adjudication of private civil actions.

was "one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States." 28 U.S.C. 2679(d) (1982). Although the Drivers Act did not expressly authorize the district court to review the scope certification, the court's power of review was surely implicit in its authority to remand. We do not agree, however, with the amicus's contention (Amicus Br. 17) that the absence of such a provision in the Westfall Act suggests that review of the certification is unavailable. To the contrary, the statute's provision that the scope certification "shall conclusively establish scope of office or employment for purposes of removal," 28 U.S.C. 2679(d)(2), strongly implies that review of certification is available insofar as the substitution of the United States is concerned. Thus, the Westfall Act retains the Drivers Act's implicit premise that the Attorney General's scope certification is subject to judicial review, while altering the jurisdictional consequence of a successful judicial challenge. Under the Drivers Act, resubstitution of the individual defendant required that a case previously removed from state court be remanded to that court. Under the Westfall Act, the district court is directed to retain jurisdiction over the suit even if the Attorney General's scope certification is overturned. See pp. 10-12, *infra*.

3. The Westfall Act provides that "[i]n the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." 28 U.S.C. 2679(d)(3). Respondent and his amicus argue that Section 2679(d)(3), by

expressly authorizing the court to resolve the scope of employment question (at the behest of the individual defendant) where the Attorney General has declined to issue a scope certification, impliedly precludes judicial review in cases where the Attorney General *does* certify. However, "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. at 674 (internal quotation marks omitted).

Respondent and his amicus rely (Resp. Br. 16-17; Amicus Br. 12) on this Court's admonition that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). That decision is inapposite to the present case. The Court emphasized in *Block* that *the same agency orders* that plaintiffs (milk consumers) sought to challenge would be subject to judicial review at the behest of other parties (milk handlers) with similar interests in contesting any unlawful agency action. 467 U.S. at 352; see also *id.* at 349 (where particular persons are authorized to seek judicial review of particular issues, "judicial review of *those issues* at the behest of other persons may be found to be impliedly precluded") (emphasis added). Here, by contrast, respondent does not contend that someone other than a tort plaintiff is authorized to seek judicial review of the Attorney

General's determination that a federal employee has acted within the scope of his employment.

4. Amicus Kellogg contends that "letting a district court determine scope of employment even when the Attorney General does certify would render the certification process of (d)(1) and (d)(2) largely superfluous." Amicus Br. 13. That is not correct. The Westfall Act's certification process facilitates the conduct of litigation by providing for a prompt substitution of parties. In cases where no FTCA exception bars suit against the United States, the Attorney General's scope certification is unlikely to be challenged in court: Many tort plaintiffs will prefer to have the United States substituted as defendant so as to ensure that any judgment will be collectible.<sup>3</sup> In such cases the certification

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<sup>3</sup> Other features of the statutory scheme, such as the unavailability of punitive damages in FTCA suits, see 28 U.S.C. 2674, may occasionally bear on the plaintiff's decision whether to seek redress from the United States or the individual employee. As a general matter, however, a plaintiff will have little incentive to contest the scope certification in cases where no FTCA exception applies, even if he harbors serious doubts as to the correctness of the Attorney General's decision. Cases in which plaintiffs have challenged the Attorney General's scope certification have typically involved situations in which an FTCA exception appeared likely to bar suit against the United States.

Under the Westfall Act, federal employees are immune from tort liability for acts committed within the scope of their employment even where an exception to the FTCA, see 28 U.S.C. 2680, precludes a damages action against the United States. See *United States v. Smith*, 499 U.S. 160 (1991). We do not agree with the contention of amicus Kellogg (see Amicus Br. 24) that judicial review of the certification decision will undermine this Court's holding in *Smith*. It is entirely clear that the Westfall Act does not

process provides an expeditious means of resolving the scope of employment issue in a manner that serves the interests of both the plaintiff and the individual employee; it thereby conserves judicial resources by eliminating the need for a trial court to make its own scope determination. Permitting judicial review in cases (such as this one) where the applicability of an FTCA exception appears likely to bar a suit against the United States will in no way undermine the usefulness of the certification process in the bulk of cases where a certification is issued.<sup>4</sup>

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confer immunity for torts committed outside the scope of employment. See 28 U.S.C. 2679(b)(1) (FTCA provides exclusive remedy for losses incurred due to "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment"); H.R. Rep. No. 700, 100th Cong., 2d Sess. 5 (1988) (Westfall Act "provides that the United States will incur vicarious liability only for the common law torts of its employees which are committed within the 'scope of their employment.' If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable."). Resubstitution of an individual employee based on the reviewing court's conclusion that the defendant did not act within the scope of his employment is fully consistent with the text, history, and purpose of the Westfall Act, and with this Court's decision in *Smith*.

<sup>4</sup> As we noted in our opening brief (U.S. Br. 21 n.6), both the Westfall Act's co-sponsor and the Department of Justice representative who testified in support of the proposed legislation expressed the view that the Attorney General's scope certification would be subject to judicial review at the behest of the plaintiff. See *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d

5. Amicus Kellogg also contends that to permit judicial review of the Attorney General's scope certification would contravene established principles of agency law, noting that "[u]nder the common law of agency, an employer can become liable for the acts of an employee by conceding that those acts are within the scope of employment." Amicus Br. 20. The amicus contends that judicial "review refuses to give the admission of the employer as to scope of employment its usual force and effect." *Id.* at 24. That argument is without basis.

The "usual force and effect" of an employer's admission regarding scope of employment is that *the employer* may be precluded from disavowing the admission at a later stage of the litigation. The issue here, however, is not whether the Attorney General's scope certification will bind the United States if the certification is un-

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Sess. 128, 133, 197 (1988) (*House Hearing*). Amicus Kellogg points out (Amicus Br. 19) that one witness who testified at the House hearing expressed the view that the Attorney General's decision regarding scope certification would not be judicially reviewable. See *House Hearing* at 184. As the representative of the National Treasury Employees Union, that witness's principal concern was for the availability of judicial review at the behest of the defendant employee where certification was denied. See *id.* at 185. We believe that the view of that witness is entitled to insubstantial weight in comparison to the construction of the bill espoused at the hearing by its co-sponsor and the Department of Justice.

Contrary to amicus Kellogg's suggestion (Amicus Br. 19-20), Representative Frank (the bill's co-sponsor) did not simply express a preference for legislation that would preserve a plaintiff's right to obtain judicial review of a scope certification. Rather, he took the position that the bill as written would accomplish that result, see *House Hearing* at 128, 197—an understanding that the Department of Justice shared. *Id.* at 128, 133.

challenged and the suit proceeds under the FTCA. The question instead is whether the Attorney General's "concession" can bind the plaintiff in a suit against the individual employee. Nothing in the common law of agency supports such a result. Nor are we aware of any other instance in which the admission of one party can bind another, at least absent some form of privity between the two litigants.

6. Although the Attorney General's scope certification is subject to challenge insofar as it bears on the substitution of the United States as defendant, the Westfall Act provides that the certification, in cases filed in state court and subsequently removed to the federal forum, "shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. 2679(d)(2). In our view this language requires that if the scope certification is overturned, the suit against the individual federal employee must go forward in federal district court and is not subject to remand. Amicus Kellogg contends that "[t]he Article III basis for granting such jurisdiction \* \* \* is questionable." Amicus Br. 29. In fact, however, no Article III problem exists. The Westfall Act's immunity from suit for torts committed within the scope of employment is a right conferred upon federal employees by federal law. Congress's conferral of federal rights under the Act provides a constitutionally sufficient basis for federal jurisdiction, even where the plaintiff's claim arises under state law. See generally *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491-497 (1983) (presence of foreign sovereign immunity issue furnishes constitutional basis for federal jurisdiction).

The amicus's argument rests on the mistaken assumption that "in those cases removed from state court in which the district court rejects the Attorney General's certification, the underlying case or controversy will not \* \* \* call for any application of federal law." Amicus Br. 31. In fact, a district court's rejection of the scope certification at a preliminary stage of the litigation often will not definitively resolve the defendant's claim to federal immunity. The court might initially conclude that the defendant was not acting within the scope of his employment, and might overturn the scope certification on that basis. That determination would not, however, foreclose the possibility that evidence subsequently obtained through discovery or presented at trial would show that the defendant's conduct, while tortious, fell within the scope of his employment. The district court's initial rejection of the scope certification therefore does not eliminate the possibility that the district court will reconsider the certification question on the basis of the evidence and that the defendant will ultimately prevail on the basis of a federal immunity.<sup>5</sup>

<sup>5</sup> Even in cases where the district court's rejection of the Attorney General's scope certification definitively resolves the scope of employment issue, retention of the case by the district court does not contravene Article III. The court's review of the immunity question clearly provides a sufficient basis for the initial removal of the case to the federal forum. See *Mesa v. California*, 489 U.S. 121, 133, 136 (1989) (federal immunity defense is a constitutionally sufficient basis for federal jurisdiction). Consistent with Article III, Congress may direct the district court to retain jurisdiction over the case even after its resolution of the scope of employment question. Cf. *United Mine Workers v. Gibbs*, 383 U.S.

In *Mesa v. California*, 489 U.S. 121 (1989), this Court noted that the federal statute allowing removal of suits against federal officers acting "under color of such office" (28 U.S.C. 1442(a)(1)) envisions removal only when the defendant officer asserts a colorable federal defense. 489 U.S. at 135. The Court suggested that a statute permitting removal of *any* lawsuit filed against a federal employee could raise serious constitutional difficulties. *Id.* at 136-139. The Westfall Act does not pose that potential problem. The Attorney General's scope certification under Section 2679(d)(2) reflects a determination that the federal employee in question has a legitimate federal defense under the Westfall Act. Even where the district court overturns the certification and resubstitutes the individual defendant, the certification establishes that the defense is at least "colorable." By contrast, Congress has expressly provided for a remand in cases where *both* the Attorney General *and* the district court have determined that the individual defendant was not acting within the scope of his employment. 28 U.S.C. 2679(d)(3).

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715, 725 (1966) (so long as "[t]he federal claim [has] substance sufficient to confer subject matter jurisdiction on the court," district court may exercise pendent jurisdiction over pendent state law claims).

\* \* \* \* \*

For the reasons stated herein, and in the opening brief for the United States, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

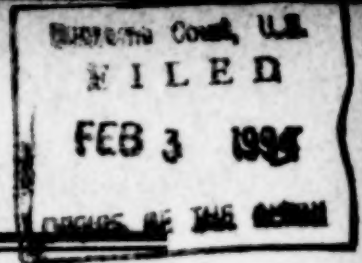
Respectfully submitted.

DREW S. DAYS, III  
Solicitor General

MARCH 1995



No. 94-167



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1994

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KATIA GUTIERREZ DE MARTINEZ, *et al.*,  
*Petitioners*,  
v.

DIRK A. LAMAGNO, *et al.*,  
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United States Court of Appeals  
for the Fourth Circuit

---

BRIEF OF MICHAEL K. KELLOGG  
AS *AMICUS CURIAE* SUPPORTING  
THE JUDGMENT BELOW

---

MICHAEL K. KELLOGG  
(*Amicus Curiae*, invited by Court,  
per order of November 15, 1994)  
KELLOGG, HUBER, HANSEN & TODD  
1300 I Street, N.W.  
Suite 500 East  
Washington, D.C. 20005  
(202) 326-7902

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### **QUESTION PRESENTED**

Whether the Attorney General's certification under the Westfall Act, 28 U.S.C. § 2679(d), that a government employee was acting within the scope of employment requires that the United States be substituted for the employee as the defendant in a civil action.

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**BRIEF OF MICHAEL K. KELLOGG  
AS *AMICUS CURIAE* SUPPORTING  
THE JUDGMENT BELOW**

### INTEREST OF *AMICUS CURIAE*

On November 15, 1994, this Court invited Michael K. Kellogg to brief and argue this case, as *amicus curiae*, in support of the judgment below.

### STATUTORY PROVISIONS INVOLVED

The Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, § 6, 102 Stat. 4564, states in relevant part:

(1) Upon certification by the Attorney General that the defendant employee was acting within the

scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General

to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

28 U.S.C. § 2679(d)(1)-(4).

#### INTRODUCTION AND SUMMARY OF ARGUMENT

In *Westfall v. Erwin*, 484 U.S. 292 (1988), this Court held that federal employees do not enjoy automatic immunity from state-law tort suits for conduct within the scope of their office or employment. Congress responded by enacting the so-called Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563. Under the Westfall Act, the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680 (1988 & Supp. 1993), is the exclusive remedy for injuries caused by the torts of federal employees acting within the scope of their employment. Upon certification by the Attorney General that an employee was acting within the scope of his employment with respect to the actions in question, the original defendant is dismissed from the suit, the United States is substituted as the defendant, and the suit proceeds against the government under the FTCA.

The question in this case is whether the Attorney General's certification as to scope of employment is reviewable in district court. May a district court, notwithstanding certification, conclude that the employee was acting outside the scope of his employment and, therefore, decline to substitute the United States as the defendant? That question must be answered in the negative.

A. The language and structure of the Westfall Act preclude such review. The Westfall Act states that when a case is brought against a federal employee in state court, "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose," the case "*shall be removed*" to federal court. In the district court, "[s]uch action or proceeding *shall be deemed* to be an action or proceeding brought against the United States . . . and the United States *shall be substituted* as the party defendant." 28 U.S.C. § 2679(d)(2) (emphasis added).

Congress's use of the word "shall" eliminates any discretion: "Congress could not have chosen stronger words to express its intent that [the specified action] be mandatory." *United States v. Monsanto*, 491 U.S. 600, 607 (1989). "By the plain language of 28 U.S.C. § 2679(d)," therefore, "no discretion is given to the district court." *Johnson v. Carter*, 983 F.2d 1316, 1319 (4th Cir.) (*en banc*), cert. denied, 114 S. Ct. 57 (1993). *Accord Aviles v. Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989) ("The mandatory language of subsection (d) does not permit [courts] to challenge the attorney general's certification.").

The Westfall Act permits the district court to make a determination as to scope of employment only in a single instance: where the Attorney General "has refused to certify scope of office or employment." 28 U.S.C. § 2679(d)(3). In that case, the defendant employee may "petition the court to find and certify that the employee was acting within the scope of his office or employment." *Ibid.* But the Westfall Act makes no provision for judicial review at the behest of the plaintiff, if the Attorney General does certify. This "detailed mechanism for judicial consideration of particular issues at the behest of particular persons" reinforces that the statute precludes "judicial review of those issues at the behest of other per-

sons." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984).

B. The legislative history of the Westfall Act confirms that district courts may not second-guess the Attorney General's certification. The now-superseded Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 28 U.S.C. § 2679(d) (1982)), which the United States acknowledges "served as the model for the Westfall Act" (U.S. Br. at 20), expressly permitted district court review of the Attorney General's certification. The fact that Congress omitted this language from the Westfall Act, and replaced it with language mandating substitution of the United States for the employee, underscores that there is no judicial review of the certification decision. That is also the clear implication of the House Report that accompanied the Westfall Act, which states that the new Act will "*require* the United States to be substituted for a Federal employee as the sole defendant in a civil lawsuit *whenever* the Attorney General determines that the act or omission alleged to have caused the claimant's injuries was within the scope of the employee's office or employment." H.R. Rep. No. 700, 100th Cong., 2d Sess. 9 (1988) (emphasis added).

C. The non-reviewability of the certification decision is consistent with basic principles of agency law. Under the common law of agency, an employer can become liable for the acts of an employee by conceding that those acts are within the scope of employment. The court does not look behind such an admission to determine whether the admission *should* have been made (*i.e.*, whether the employee was actually acting within the scope of his employment). The certification process is akin to an admission by the United States that the employee was acting within the scope of his employment. The admission is binding upon the United States and causes the United States to be substituted as defendant in the suit.

In some instances, after the defendant employee drops out of the case, the United States will be able to dismiss the suit based on a retained immunity under the FTCA. See *United States v. Smith*, 111 S. Ct. 1180, 1185 (1991) (the Westfall Act "makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability"). The lower court decisions permitting judges to second-guess the Attorney General's certification are, at bottom, simply an attempt to avoid the implications of this statutory scheme. They ignore a basic principle of agency law—the binding nature of an employer's admission as to scope of employment—so as to evade the retained immunities of the United States as employer.

D. The United States' reading of the statute also causes practical problems that undermine the policies of Congress. It invites plaintiffs, through "artful pleading," to "transform a job-related tort into a non-job-related tort simply by alleging, say an 'off-duty' state of mind (such as 'malicious' intent) or by alleging that a negligent action was carried out intentionally." *Wood v. United States*, 995 F.2d 1122, 1129 (1st Cir. 1993).

In such circumstances, a determination on the merits is effectively required before the immunity question can be resolved. In order to prove that he is entitled to immunity, because he was acting within the scope of his employment, the employee has to prove that he did not discriminate or harass or commit battery or slander (all torts that arguably cannot fall within the employee's scope of employment). Lower courts that accept the United States' reading of the statute have accordingly developed elaborate procedures to deal with the scope of employment issue. These mini-trials on the merits—with the consequent concerns about ultimate liability—defeat the Westfall Act's basic objective of avoiding "protracted personal tort litigation for the entire Federal workforce." See Westfall Act § 2(a)(5).

E. Finally, judicial review of the certification decision would raise a serious Constitutional problem. Under the United States' reading of the statute, certification is conclusive with respect to removal but not with respect to substitution. Thus, when a case is removed to federal court pursuant to Section 2679(d)(2), a federal court may determine that, notwithstanding certification, the defendant was acting outside the scope of his employment and therefore decline to substitute the United States as defendant. But then, even if there is no diversity and no federal question in the case, the court will be powerless to remand the action to state court. See 28 U.S.C. § 2679 (d)(2) (certification "shall conclusively establish scope of office or employment for purposes of removal").

The Article III basis for granting such jurisdiction is questionable, unless this Court adopts a theory of "protective jurisdiction," or ratifies a broad reading of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1924). Moreover, even if the statute, as interpreted by the United States, could scrape by under Article III—even if the Court decides that the Attorney General's certification alone (invalid though it may be) confers subject matter jurisdiction on the court—there is no reason to believe that Congress wanted to push the constitutional envelope so far. It would be unprecedented for Congress to *compel* a district court to retain jurisdiction over a purely state law case, simply because, at the outset of the case, the validity of the Attorney General's certification had to be determined.

The Court should accordingly decline the United States' invitation to twist the language, structure, history, and underlying policies of the statute, and to trample on basic principles of agency law, all in order to reach a result that itself would raise serious constitutional concerns.

## ARGUMENT

**THE ATTORNEY GENERAL'S CERTIFICATION UNDER 28 U.S.C. § 2679(d), THAT A GOVERNMENT EMPLOYEE WAS ACTING WITHIN THE SCOPE OF EMPLOYMENT, REQUIRES THAT THE UNITED STATES BE SUBSTITUTED FOR THE EMPLOYEE AS THE DEFENDANT.**

### **A. The Language and Structure of the Westfall Act Preclude District Courts from Second-Guessing the Attorney General's Certification.**

The United States, in its brief, relies heavily on a general presumption in favor of judicial review of executive action. *See* U.S. Br. at 16. But, aside from its striking inapplicability in this particular context (*see* sections C & D, *infra*), “[t]he presumption favoring judicial review . . . is just that—a presumption. This presumption, like all presumptions used in interpreting statutes, may be overcome by specific language” in the statute in question and “by inferences of intent drawn from the statutory scheme as a whole.” *Block v. Community Nutrition Inst.*, 467 U.S. at 349. *See also, e.g., Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-63 (1979); *Schilling v. Rogers*, 363 U.S. 666, 670-77 (1960); *Morris v. Gressette*, 432 U.S. 491 (1977); *Switchmen's Union of N. Am. v. National Mediation Bd.*, 320 U.S. 297 (1943). Indeed, it is only “where substantial doubt about the congressional intent exists,” based on the language and structure of the statute, that “the general presumption favoring judicial review . . . is controlling.” *Block*, 467 U.S. at 349.

Here, there can be no doubt about congressional intent if words are given their normal meaning. The Westfall Act states that, “[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States

district court *shall be deemed* an action against the United States . . . and the United States *shall be substituted* as the party defendant.” 28 U.S.C. § 2679(d)(1) (emphasis added). This mandatory language is repeated in subsection (d)(2) concerning removal of cases brought against employees in state court: upon certification by the Attorney General, the case “shall be removed,” the action “shall be deemed” to be against the United States, and the United States “shall be substituted” as the party defendant. 28 U.S.C. § 2679(d)(2). *See also* 28 U.S.C. § 2679(d)(4) (“Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) *shall* proceed in the same manner as any action against the United States”) (emphasis added).

There is no wiggle room here. As this Court has explained, where the word “shall” appears in a statutory directive, “Congress could not have chosen stronger words to express its intent that [the specified action] be mandatory.” *United States v. Monsanto*, 491 U.S. at 607. *Black's Law Dictionary* describes the term “shall” as “a word of command, . . . which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means ‘must’ and is inconsistent with a concept of discretion.” *Black's Law Dictionary* 1375 (6th ed. 1990). Indeed, “[i]t has the invariable significance of excluding the idea of discretion.” *Ibid.* Other sources are to the same effect.<sup>1</sup>

“By the plain language of 28 U.S.C. § 2679(d),” therefore, “no discretion is given to the district court.” *Johnson v. Carter*, 983 F.2d at 1319. Once certification has occurred, substitution *shall* follow inexorably. “The man-

<sup>1</sup> *See, e.g., Random House Unabridged Dictionary* 1757-58 (2d ed. 1993) (“Shall . . . (3) (in laws, directives, etc.) must; is or are obliged to”); *American Heritage Dictionary* 1125 (2d ed. 1985) (“Shall . . . c. Command . . . d. A directive or requirement.”); *Webster's Ninth Collegiate Dictionary* 1081 (1987) (“Shall . . . b—used in laws, regulations, or directives to express what is mandatory”).

datory language of subsection (d) does not permit [courts] to challenge the attorney general's certification." *Aviles v. Lutz*, 887 F.2d at 1049.

The United States tries to finesse the word "shall" in a way that merely reinforces it. The United States (Br. at 15) points out that "[t]he judicial rules governing joinder of parties are commonly phrased in mandatory terms." For example, Federal Rule of Civil Procedure 19(a) states that persons "shall be joined" if certain conditions are met, and Rule 24(a) states that "anyone shall be permitted to intervene" if certain other conditions are met. Despite the use of the word "shall" in each instance, the United States explains, "[p]arties are nevertheless entitled to challenge joinder on the ground that the legal and factual predicates for adding new parties have not been satisfied, and the federal district courts are responsible for resolving those questions." Br. at 15.

But the same is true here. The "legal and factual predicate" for substitution of the United States is certification. A plaintiff can certainly challenge substitution on the grounds that the Attorney General did not certify, and the federal district courts are responsible for resolving that question, just as they are responsible under Federal Rule of Civil Procedure 19(a) for determining whether the conditions for mandatory joinder have been met and under Rule 24(a) for determining whether the conditions for intervention of right have been met.

In each instance, the statute or rule itself describes the precise conditions which, if found to exist, mandate a certain result. Under Rule 19(a) there are certain express conditions which, if found to exist, require joinder.<sup>2</sup>

<sup>2</sup> Rule 19(a) provides:

Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already

Under Rule 24(a), there are certain express conditions which, if found to exist, require the court to permit intervention.<sup>3</sup>

Here, the only condition precedent to substitution of the United States enumerated in the statute is "certification." The statute does *not* state that "if the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose," the United States shall be substituted as defendant. If that were the case, then the district court would be responsible for resolving that question, and the reliance of the United States on Rules 19(a) and 24(a) would make some sense. But the Westfall Act looks only to the Attorney General's certification. Whether certification has occurred is the only event the district court is charged with determining.

parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

<sup>3</sup> Rule 24(a) provides:

Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

This natural reading of Section 2679(d) is also consistent with the structure of the Westfall Act. The Act permits the district court to make a determination as to scope of employment only in a single instance: where the Attorney General "has refused to certify scope of office or employment." 28 U.S.C. § 2679(d)(3). In that case, the defendant employee may "petition the court to find and certify that the employee was acting within the scope of his office or employment." *Ibid.* But the Westfall Act makes no provision for judicial review at the behest of the plaintiff, if the Attorney General does certify.

As this Court has noted, "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons [here, the defendant employees], judicial review of those issues at the behest of other persons [such as the plaintiffs] may be found to be impliedly precluded." *Block*, 467 U.S. at 349.<sup>4</sup> See also *Switchmen's Union of N. Am. v. National Mediation Bd.*, 320 U.S. at 300-01; cf. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 542 (1983). Or, as the United States (Br. at 20) so aptly explains, "it is generally presumed that Congress acts intentionally and purposely," when it "includes particular language in one section of a statute but omits it in another." *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994)."

Consistent with these principles, this Court appears to have previously read the statute as precluding review of the Attorney General's certification. See *United States v. Smith*, 111 S. Ct. 1180 (1991). The precise question at issue here was not presented in *Smith*. But, in discussing certification, the Court referred to "the required substitu-

<sup>4</sup> Here, of course, the Court does not have to rely on implied preclusion. While Section 2679(d)(3) expressly provides for judicial review at the behest of the defendant, Sections 2679(d)(1) and (d)(2), by their mandatory language, expressly preclude judicial review in other circumstances.

tion of the United States as the defendant," *id.* at 1185 (emphasis added), and contrasted that with the situation in which the Attorney General declines to certify. "Once certification occurs," the Court explained, "the action 'shall be deemed an action against the United States [under the FTCA] and the United States shall be substituted as the party defendant.' Where the Attorney General refuses to seek certification, the Act permits the employee to seek a judicial determination that he was acting within the scope of his employment." *Id.* at 1184 n.5 (citations omitted).

Indeed, letting a district court determine scope of employment even when the Attorney General does certify would render the certification process of (d)(1) and (d)(2) largely superfluous. The federal employee will always prefer to be replaced as defendant by the United States and therefore can always be expected to petition the Court for a ruling on scope of employment under (d)(3) if he or she has a colorable argument. If the fact of certification under (d)(1) or (d)(2) does not have conclusive effect on the question of scope of employment—if the district court can make its own determination on this issue, notwithstanding the Attorney General's certification—then all that is necessary to trigger the Court's determination is a petition under (d)(3). Certification under (d)(1) or (d)(2) becomes an empty formality.<sup>5</sup>

<sup>5</sup> The United States has argued in lower courts that the Attorney General's certification, although not conclusive, still warrants "substantial deference" and that the plaintiff, therefore, bears a heavy burden of proving that the defendant was acting outside the scope of her employment. See, e.g., Brief of the United States at 22, *S.J. & W. Ranch, Inc. v. Lehtinen* (11th Cir. 1990) (No. 89-5990). But there is no apparent basis in the statute for such deference, and all the lower courts considering that argument have rejected it. See *Schrob v. Catterson*, 967 F.2d 929, 936 n.13 (3d Cir. 1992); *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir. 1991); *Hamrick v. Franklin*, 931 F.2d 1209, 1211 (7th Cir.), cert. denied, 112 S. Ct. 200 (1991); *S.J. & W. Ranch v. Lehtinen*, 913 F.2d 1538, 1543 (11th Cir. 1990), cert.

The United States attempts to bolster its position by pointing to the fact that Congress “explicitly precluded judicial review of the certification decision with respect to removal” of cases from state courts. Br. at 20 (citing 28 U.S.C. § 2679(d)(2) (“This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal”)). Since “Congress did not state . . . that the Attorney General’s certification would also ‘conclusively’ establish the scope of office or employment for purposes of substitution,” the United States argues (Br. at 20), it is “natural to conclude that Congress intended . . . that the courts would continue to have authority to review scope-of-employment certifications for purposes of substitution.”

But, of course, Congress did—through use of the mandatory word “shall”—state that the Attorney General’s certification would conclusively establish scope of employment for purposes of substitution. The fact that Congress added additional words to reinforce that point in the context of removal does not alter the evident meaning of the language used concerning substitution. To the contrary, it reinforces it. Removal—because it concerns the jurisdiction of the court—is most likely to spark *de novo* judicial review, notwithstanding the plain language of the statute. See, e.g., *Nasuti v. Scannell*, 906 F.2d 802, 808 (1st Cir. 1990) (citing “the district court’s normal power to determine . . . the court’s own subject-matter jurisdiction” as a reason for disregarding the language of the Westfall Act). In that context, where a court would otherwise be most likely to second-guess the Attorney General’s determination, the statute underscores that review is not appropriate.

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*denied*, 112 S. Ct. 62 (1991); *Nasuti v. Scannell*, 906 F.2d 802, 808 (1st Cir. 1990). Once the United States abandons its mooring in the mandatory language of the statute, the Attorney General’s certification is simply cast adrift, with no further relevance to the ultimate question of scope of employment.

Beyond this, the United States’ attempt to bifurcate removal and substitution—whereby certification is conclusive for purposes of the one, but not of the other—is contrary to the logical framework of the statute. Under Section 2679(d)(3), which permits the defendant employee to petition for a finding by the Court as to scope of employment when the Attorney General declines to certify, the United States may (if the case is in state court) remove it to district court for a determination of scope of employment. “If, in considering the petition,” the statute goes on to state, “the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.” 28 U.S.C. § 2679(d)(3) (emphasis added). In other words, Congress intended removal and substitution to go together. There is no indication that Congress wanted purely state law claims, without any diversity, based on actions outside the scope of employment, in cases in which the United States is not substituted as defendant, to be heard in federal court. Certification must be conclusive as to both removal and substitution, or neither. Since, as the United States correctly concedes (*see* pp. 33-34, *infra*), it must be conclusive as to removal, then it must be so with respect to substitution as well.

#### **B. The History of the Westfall Act Confirms that District Courts May Not Second-Guess the Attorney General’s Certification.**

The nature of the current statutory scheme is highlighted by its difference from the now-superseded Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 28 U.S.C. § 2679(d) (1982)), which the United States acknowledges “served as the model for the Westfall Act.” Br. at 19.<sup>6</sup> The Federal Drivers Act made

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<sup>6</sup> For the convenience of the Court, the Federal Drivers Act is reprinted in full as an Appendix to this brief.

the FTCA the exclusive remedy for injuries "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C. § 2679(b) (1982). The Federal Drivers Act, like the Westfall Act, provided for certification of scope of employment by the Attorney General and stated that, upon such certification in a state court action, the action "shall be removed" to federal district court and "the proceedings deemed a tort action brought against the United States" under the FTCA. 28 U.S.C. § 2679(d) (1982). In other words, upon certification two consequences followed: removal of the case to federal court and substitution of the United States as defendant.

The United States notes (Br. at 19) that "district courts routinely resolved challenges to the Attorney General's certifications under the Federal Drivers Act when determining whether the case was properly removed and the United States was properly substituted as the defendant." The United States suggests (*id.* at 20) that "[i]f Congress had intended to depart from that established practice . . . and make the Attorney General's scope-of-employment certifications [under the Westfall Act] conclusive on the courts, one would expect that it would have done so explicitly."

What the United States rather surprisingly fails to mention, however, is that *the Federal Drivers Act itself expressly provided that the Attorney General's certification was reviewable, both for purposes of substitution and for purposes of removal.* See 28 U.S.C. § 2679(d) (1982):

Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States [*i.e.*, it is not a case "resulting from the operation by any employee of the Government of any

motor vehicle while acting within the scope of his office or employment" (28 U.S.C. § 2679(b) (1982))], the case shall be remanded to the State court.

The fact that Congress omitted this language from the Westfall Act, and replaced it with language precluding judicial review, underscores what the plain language of the Westfall Act indicates: that there is no judicial review of the certification decision, with respect either to substitution or to removal. See *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988) ("Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning."), *cert. denied*, 488 U.S. 1010 (1989).

Under the Federal Driver's Act, substitution and removal were treated alike: if the certification was rejected by the district court then the United States was not substituted as a defendant and the case was remanded to state court. Under a proper reading of the Westfall Act, substitution and removal are also treated alike: certification is conclusive with respect to both. That is certainly the clear implication of the House Report that accompanied the Westfall Act. The Report notes:

Section 6 would amend section 2679(d) of title 28 to *require* the United States to be substituted for a Federal employee as the sole defendant in a civil lawsuit *whenever* the Attorney General determines that the act or omission alleged to have caused the claimant's injuries was within the scope of the employee's office or employment. Once made, this determination also would *require* that any case filed in State court be removed to a Federal district court.

H.R. Rep. No. 700, 100th Cong., 2d Sess. 9 (1988) (emphasis added). There is no indication in the Report that, contrary to this mandatory language, the certification decision is reviewable. Nor, certainly, is there any indication that Congress intended to bifurcate the issues

of substitution and removal: the same language is used with respect to both. The only time that review of the scope-of-employment issue is mentioned is where "the Attorney General refuses to certify that an employee was acting within the scope of his office or employment." *Ibid.* In that instance, "the employee is authorized to petition the Court for a ruling on this determination." *Ibid.* There is no comparable reference to review at the behest of a plaintiff when the Attorney General does certify. Any member of Congress reading the report, like any member of Congress reading the statute, would conclude that no such review is permitted.

The United States claims that some snippets from the legislative hearings indicate a congressional "understanding" that the Attorney General's certification would be reviewable for purposes of substitution. U.S. Br. at 21 n.6. But the statements of one Congressman and one witness, buried in a 278 page hearing transcript, hardly rise to the level of a congressional "understanding." Moreover, the United States is simply wrong in stating that "[n]othing in the legislative history contradicts that understanding." *Ibid.*

Aside from the fact that a House Report lays greater claim to reflect congressional understanding than isolated statements in the legislative hearings, a more complete perusal of the hearings themselves is enough to disturb the United States' attempted "gestalt judgment as to what Congress probably intended." *Garcia v. United States*, 469 U.S. 70, 78 (1984). As originally drafted, the Act did not contain Section 2679(d)(3), which permits an employee to petition the Court for a ruling on scope of employment whenever the Attorney General declines to certify. See H.R. 4358, reprinted in *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 3083 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 2

(1988) ("Hearing"). Lois G. Williams, Director of Litigation of the National Treasury Employees Union, objected to the Act precisely because the Attorney General's certification decision was not subject to review. "The Attorney General's certification under the Federal Drivers Act is," Ms. Williams testified, "at least in some degree, reviewable by a court. . . . The proposed legislation, however, purports to remove any review." *Hearing* at 184. Ms. Williams expressed concern, on behalf of federal employees, that "if the Attorney General has sole discretion over the scope of duty questions, the appearance of conflict of interest is unavoidable in many cases. The representative of the government that will be liable for damages, should a case be proved, is empowered to decide whether the government or the employee will defend the suit, and perhaps who will pay the damages." *Ibid.*

In the colloquy that followed Ms. Williams' statement, Representative Barney Frank, the Chairman of the House subcommittee considering the legislation, expressed sympathy with Ms. Williams' concerns about employee defendants. He also indicated that he thought plaintiffs should "have the right to go into court and say, baloney, it was not within the scope of employment . . . ." *Hearing* at 197 (remarks of Mr. Frank). Chairman Frank then went on to say:

Clearly we want this issue [of scope of employment] to be fairly litigated . . . . I think there would be agreement that that is the way we would want to go. . . . [I]f all of you would feel free to propose on that suggestion we will try to work it out.

The way the subcommittee "work[ed] it out," was by adding Section 2679(d)(3), which allows the defendant employee to challenge a failure to certify. H.R. Rep. No. 700 at 9. No comparable provision was added to permit the plaintiff to challenge the certification. Thus, whatever assumptions Chairman Frank might have expressed about "the way [the subcommittee] would want to go," the way

they went, and the way Congress as a whole went, was against any judicial review at the behest of the plaintiff in cases in which the Attorney General does certify scope of employment.

In short, the legislative history relied upon by the United States actually undermines the Government's position. Certainly, that history is not enough to override the language and structure of the statute.

**C. The United States' Reading of the Westfall Act Ignores Basic Principles of Agency Law That Congress Showed No Intent to Override.**

In the final analysis, without language or history to sustain it, the force of the United States' position reduces to a single sentence: "The proposition that a plaintiff cannot obtain judicial review of the Attorney General's scope-of-employment certification under the Westfall Act might," the United States claims, "excite some surprise." Br. at 17 (quoting *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835)). In other words, the question of scope of employment is important to litigants and one would, therefore, expect the courts to be the final arbiters of that issue. U.S. Br. at 17-18. But, even if it were consistent with the statute, that expectation would be wholly out of place in this context because it ignores basic principles of agency law.

Under the common law of agency, an employer can become liable for the acts of an employee by conceding that those acts are within the scope of employment. *Restatement (Second) of Agency* § 219 (1958). This is true even when the acts in question are torts. *Novick v. Gouldsberry*, 173 F.2d 496, 502-03 (9th Cir. 1949).

Ordinarily, of course, employers try to disavow that their employees were acting within the scope of employment at the time of an accident. The plaintiff, by contrast, seeking the deepest pocket around, argues that the employee was acting within the scope of employment. The

court then decides the question. See 5 F. Harper, F. James, Jr., & O. Gray, *The Law of Torts* 1-60 (2d ed. 1986). If, however, the employer concedes scope of employment or otherwise ratifies the employee's actions, there is nothing for the court to decide. Such an "admission" or "ratification" is a "speech act" that intrinsically carries certain consequences, such as potential liability for the torts of the employee. A court might determine that the speech act did not occur (*i.e.*, that the employer did not really admit scope of employment), but assuming that a valid admission has been made, the court does not look behind it to determine whether the admission *should* have been made (*i.e.*, whether the employee was actually acting within the scope of his employment).

It is reasonable to think that Congress would have wanted the same basic principle to apply here. As the United States acknowledges (Br. at 5), "[t]he FTCA incorporates principles similar to the common law doctrine of respondeat superior, which allows a plaintiff to sue a private employer for torts committed by employees acting within the scope of their employment."<sup>7</sup> The certification process is akin to an admission by the United States that the employee was acting within the scope of his employment. The admission is binding upon the United States and causes the United States to be substituted as defendant in the suit. The district court can determine whether the certification actually occurred, but it cannot look behind the process to determine whether it should have occurred. If there is a valid certification, if the United States makes this critical admission as to scope

<sup>7</sup> See also Westfall Act, § 2(a)(2) (noting that the United States is "responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment").

of employment, then the United States must be substituted as defendant in the case.<sup>8</sup>

Ordinarily, under the common law, the employee does not get off the hook simply because the employer admits scope of employment. The plaintiff can proceed against both the employer and the employee, who are jointly and severally liable. *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 191 (5th Cir. 1989); *Restatement (Second) of Agency* §§ 343, 359c (1958). But that is exactly the situation that the Westfall Act was designed to change. See Westfall Act, § 2(a)(5)-(6) ("This erosion of immunity of Federal employees [created by the *Westfall* decision] has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire federal workforce. The prospect of such liability will seriously undermine the morale and well being of federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts."). Under the Westfall Act, whenever the United States admits scope of employment (through certification), the employee drops out of the case.

<sup>8</sup> The Court dealt with these basic principles of agency law quite recently in *FEC v. NRA Political Victory Fund*, 63 U.S.L.W. 4027 (U.S. Dec. 6, 1994). In that case, a federal agency filed a petition for certiorari without authorization from the Solicitor General. The Solicitor General, while acknowledging that the agency had no authority to file the petition, attempted to ratify the filing after the fact. This Court explained that the propriety of the petition "is at least presumptively governed by principles of agency law and in particular the doctrine of ratification." *Id.* at 4030. The Court concluded that the Solicitor General did have authority to ratify the ultra vires act of the agency, but held that, because the time for filing a petition had passed before the Solicitor General ratified the act, the ratification was invalid. The Court certainly did not suggest that the merits of the Solicitor General's decision to authorize the petition would somehow be subject to review, if timely made.

The complicating factor under the Westfall Act is that, after substitution, the United States is not always subject to suit. In the normal FTCA case, of course, the United States' admission as to scope of employment is as much against interest as any employer's admission. But the United States has retained a number of immunities, such as for discretionary functions, for torts committed outside the United States, and for claims of libel, tortious interference with contracts, assault and battery, false imprisonment, and other enumerated categories. 28 U.S.C. § 2680. Thus, in some instances, after the defendant employee drops out of the case, the United States will be able to dismiss the suit based on a retained immunity under the FTCA.

Congress recognized this somewhat harsh consequence of substitution but still decided to immunize the employee. See *Smith*, 111 S. Ct. at 1185 (the Westfall Act "makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability"). Suing the United States, Congress noted, has certain advantages, notwithstanding the retained immunities.

From the perspective of a person injured by the official conduct of a Federal employee, the ability to sue the United States under the FTCA generally has distinct advantages over a suit against the individual Federal employee. The FTCA has an established administrative claims procedure through which many claims can be expeditiously resolved without costly litigation. And, perhaps most important the United States Government will be able to pay any judgment that is awarded, while an individual Federal employee may be "judgment-proof."

H.R. Rep. No. 700 at 4. See generally *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989).

The burden of this benefit is that sometimes the plaintiff will not be able to proceed with his suit at all.<sup>9</sup>

At bottom, the various lower court decisions permitting judges to second-guess the Attorney General's certification are an attempt to avoid the implications of this statutory scheme. Because "[s]ubstitution of the United States as the defendant . . . not only immunizes the governmental employee but also may deprive the plaintiff of important procedural and substantive rights under state law," *McHugh v. University of Vermont*, 966 F.2d 67, 71 (2d Cir. 1992), these courts have concluded that the plaintiff should be able to obtain a judicial ruling on scope of employment. But such review refuses to give the admission of the employer as to scope of employment its usual force and effect. It ignores a basic principle of agency law—the binding nature of an employer's ratification of the actions of an employee—so as to evade the retained immunities of the United States as employer.

**D. The United States' Reading of the Westfall Act Creates Serious Administrative Problems and Undermines the Policy Objectives of the Act.**

In *Smith*, the Ninth Circuit had attempted to make the validity of a substitution turn on the immunities available to the government defendant. If the United States was immune it could not be substituted for the employee defendant. If the United States was not immune, it could be substituted. This Court rejected that approach.

Some courts of appeals are now attempting to reach the same result through the back door by ruling, first, that certification is reviewable and, then, that many of the

<sup>9</sup> In fact, however, there will often be an administrative remedy (as there is in this case) that the plaintiff will be able to pursue, notwithstanding the dismissal of the suit against the United States. See 21 U.S.C. § 904 (authorizing the settlement of tort claims that "arise in a foreign country in connection with the operations of the [DEA] abroad").

torts for which the United States has retained an immunity—generally, intentional torts—are, ipso facto, not within the scope of employment. See, e.g., *Nasuti*, 906 F.2d at 810 (assault and battery); *Wood v. United States*, 995 F.2d 1122, 1126 (1st Cir. 1993) (sexual harassment). "Although the tort and agency laws of the states vary, generally an intentional tort is regarded as falling outside the scope of employment—at least if the employee's conduct 'is different in kind from that authorized . . . or too little activated by a purpose to serve [the employer].'" *Kimbrow v. Velten*, 30 F.3d 1501, 1505 (D.C. Cir. 1994) (quoting *Restatement of Agency (Second)* § 228 (1958)).

Thus, in order to escape the framework of the Westfall Act, and the implications of this Court's holding in *Smith*, plaintiffs simply need to allege torts that, because of their intrinsic nature, arguably cannot fall within the employee's scope of employment. See, e.g., *Nasuti v. Scannel*, *supra* (claim of negligent driving transmuted into alleged assault and battery); *Johnson v. Carter*, *supra* (disputed disciplinary action becomes claim for libel, slander, and intentional infliction of emotional distress); *Aviles v. Lutz*, *supra* (failure to promote becomes claim for defamation and tortious interference with employment rights). "[S]uch an approach," the D.C. Circuit has noted, "puts a premium on skillful pleading and is quite unfair to the employee defendant." *Kimbrow v. Velten*, 30 F.3d at 1509. See also *Wood v. United States*, 995 F.2d at 1129 (plaintiff may "through artful pleading, transform a job-related tort into a non-job-related tort simply by alleging, say an 'off-duty' state of mind (such as 'malicious' intent) or by alleging that a negligent action was carried out intentionally").

Such an approach also effectively requires a determination on the merits before the immunity question can be resolved. "[T]he scope question and the merits in these sorts of cases often overlap—sometimes exactly." *Kimbrow*

*v. Velten*, 30 F.3d at 1505. In order to prove that he is entitled to immunity, because he was acting within the scope of his employment, the employee has to prove that he did not discriminate or harass or commit battery or slander.

The lower courts that accept the United States' reading of the statute have accordingly developed elaborate and protracted procedural mechanisms for dealing with the scope of employment issue. As one court has explained, "[c]oncluding that judicial review is appropriate raises subsidiary but highly significant issues . . . such as when the scope-of-employment determination should be made (before or at trial); who should make it (court or jury); and whether any deference should be paid to the Attorney General's certification." *Brown v. Armstrong*, 949 F.2d 1007, 1011 (8th Cir. 1991). There is general agreement only on the last of these questions. The Attorney General's certification decision is reviewed *de novo*, without any deference. See n.5, *supra*. On the other questions, the courts are all over the map. One court has identified no fewer than four possible approaches to "resolving the issues presented when a plaintiff challenges the certification." *Melo v. Hafer*, 13 F.3d 736, 743 (3d Cir. 1994). The most commonly used of these approaches require discovery, followed by an evidentiary hearing. See, e.g., *Schrob v. Catterson*, 967 F.2d 929, 936 (3d Cir. 1992) ("if there is a genuine issue of fact material to the scope of employment question, the district court should permit discovery and conduct a hearing"); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1544 (11th Cir. 1990) ("On remand the district court should conduct a *de novo* hearing on whether defendant Lehtinen's conduct occurred within the scope of his employment and permit the plaintiff full recovery on the scope question.") (internal footnote omitted), *cert. denied*, 112 S. Ct. 62 (1991). Moreover, "[i]f the court, in the course of determining the substitution issue, necessarily finds facts that are part of the plaintiff's case on the merits, the defendant may be

estopped from disputing those facts at trial," *Melo v. Hafer*, 13 F.3d at 748 n.8, thus effectively forcing the defendant to stand trial on the ultimate issue of liability before immunity can be determined.<sup>10</sup>

Such a mini-trial on the merits—with all the consequent concerns about ultimate liability—defeats the Westfall Act's basic objective of avoiding "protracted personal tort litigation for the entire Federal workforce." See Westfall Act § 2(a)(5). See also *Barr v. Mateo*, 360 U.S. 564, 571 (1959) (the point of immunity is to avoid "suits which would consume time and energies which would otherwise be devoted to governmental service"). In passing the Westfall Act, Congress stressed the need for an "early resolution of the case" against the employee and the dangers of making immunity turn on a protracted "fact-based determination." H.R. Rep. No. 700 at 3. The United States' reading of the statute ignores these concerns. Granting conclusive effect to the Attorney General's certification, by contrast, allows the United States itself to determine the circumstances in which its employees' actions warrant immunity and, thereby, to pre-empt any further proceedings against those employees.

Petitioners (Br. at 39) attempt to identify various constitutional problems with permitting the Attorney Gen-

<sup>10</sup> Under another approach identified in *Melo*, 13 F.3d at 743, the court must "accept all of the factual allegations of the complaint as true and, after discovery and an evidentiary hearing where appropriate, determine any disputes of law or fact relevant to whether the defendant's conduct as alleged by the plaintiff is within the scope of the defendant's employment." Yet another, intermediate approach adopted by the court in *Wood*, 995 F.2d at 1129, accepts the plaintiff's allegation that "some kind of harm-causing incident" occurred, but allows the defendant to dispute the plaintiff's "'characterization' or 'description'" of that incident. On these approaches, the defendant is not even entitled to dispute the core allegations of the plaintiff's complaint at the immunity stage, lest the plaintiff be stripped of his right to a jury trial. *Ibid.* In other words, immunity is completely subordinated to liability. As long as the complaint is artfully drawn, the defendant must stand trial and submit his fate to a jury.

eral's certification to be conclusive. Some lower courts are likewise sure that there is a problem, though precisely what that problem is is a matter of debate. Some see the issue as one of due process,<sup>11</sup> others as separation of powers,<sup>12</sup> still others equal protection;<sup>13</sup> one court has even suggested a taking.<sup>14</sup>

Significantly, the United States does not advance any of these arguments. To the contrary, the United States has expressly and quite properly rejected them elsewhere. "[S]tatutes calling for substitution of the United States for private defendants have routinely been upheld against constitutional challenge," the United States has noted, and "[t]here is no apparent reason why entrusting the determination of one factual predicate to such substitution to an Executive Branch official, as opposed to the courts, should raise issues of constitutional proportion." Brief for Appellee the United States at 20 n.11, *S.J. & W. Ranch v. Lehtinen*, No. 89-5990 (11th Cir. Feb. 5, 1990). *Accord Johnson v. Carter*, 983 F.2d at 1320 n.7. It is difficult to see any constitutional problem in requiring a district court to give the ordinary, common law force and effect to an employer's admission as to scope of employment. It is equally difficult to see such a problem in respecting the retained immunities of the United States.

<sup>11</sup> See, e.g., *Meridian*, 939 F.2d at 744 ("leaving the final determination of scope to the Attorney General would allow an interested party to control a dispositive issue and would present possible due process implications").

<sup>12</sup> See, e.g., *Nasuti*, 906 F.2d at 813 ("there might be a separation of powers question if the statute were read to leave the Attorney General as the sole judge of an issue determinative of the jurisdiction of the federal court").

<sup>13</sup> See, e.g., *McHugh v. University of Vermont*, 966 F.2d at 74 (there is no valid reason "to give federal employees who are sued a judicial hearing on the scope of employment, as the Westfall Act explicitly does, while denying it to those who have sued them").

<sup>14</sup> See *McHugh*, 966 F.2d at 74 (tort claim is species of property).

#### E. The United States' Reading of the Westfall Act Creates an Article III Problem.

In contrast to the constitutional spectres raised by petitioners and by some lower courts, the United States' reading of the Westfall Act does raise a potentially serious Article III problem. As already noted, under the United States' reading of the statute, certification is conclusive with respect to removal but not with respect to substitution. Thus, when a case is removed to federal court pursuant to Section 2679(d)(2), a federal court may determine that, notwithstanding certification, the defendant was acting outside the scope of his employment and therefore decline to substitute the United States as defendant. But then, even if there is no diversity and no federal question in the case, the court will still be powerless to remand the action to state court. See U.S. Br. at 20 (citing *Aliota v. Graham*, 984 F.2d 1350, 1356 (3d Cir. 1993) (once a suit is removed under Section 2679(d)(2), the district court has exclusive jurisdiction and "has no authority to remand the case on the ground that the Attorney General's certification was erroneous"), *cert. denied*, 114 S. Ct. 68 (1993)).

Section 2679(d)(2), under the United States' reading, must therefore be treated as a naked grant of subject matter jurisdiction for all suits against federal employees where the Attorney General has issued a certification, notwithstanding a court finding that the certification is invalid. *Accord Aliota v. Graham*, 984 F.2d at 1357 ("subject matter jurisdiction is conclusively established upon the Attorney General's certification").

The Article III basis for granting such jurisdiction in cases involving purely state law claims, without any diversity, based on actions outside the scope of federal employment, is questionable. See *Kimbrow v. Velten*, 30 F.3d at 1510 n.6 ("A determination that the employee's conduct was outside the scope of employment might strip the district court of Article III jurisdiction since whatever issues are left are state only."). As this Court has explained,

"pure jurisdictional statutes which seek 'to do nothing more than grant jurisdiction over a particular class of cases' cannot support Art. III 'arising under' jurisdiction." *Mesa v. California*, 489 U.S. 121, 136 (1989) (quoting *Verlinden B.V. v. Central Bank*, 461 U.S. 480, 496 (1983)).

The Third Circuit suggested that the statute, as construed by the United States, passes Article III muster because it "give[s] the government an unchallengeable right to have a federal forum for tort suits brought against its employees." *Melo v. Hafer*, 912 F.2d 628, 641 (3d Cir. 1990), *aff'd on other grounds*, 502 U.S. 21 (1991). But this Court has expressly declined to approve any such theory of "protective jurisdiction," based on a "generalized congressional interest in protecting federal officers from state court interference." *Mesa v. California*, 489 U.S. at 137.<sup>15</sup> Rather, the Court has indicated that the underlying suit must itself "raise[] questions of substantive federal law." *Verlinden B.V. v. Central Bank*, 461 U.S. at 493.<sup>16</sup>

<sup>15</sup> Such a theory is also inconsistent with Section 2679(d)(3), which requires a remand to state court in cases in which a federal court declines to substitute the United States as defendant upon the petition of the federal employee.

<sup>16</sup> It is not sufficient for Article III purposes that the threshold substitution issue could be characterized as a question of federal law insofar as the standard for substitution (scope of employment) is set forth in a federal statute. As an initial matter, the district court will in fact be applying state law to determine scope of employment. *Williams v. United States*, 350 U.S. 857 (1955). More fundamentally, a federal statute creating subject matter jurisdiction for a certain class of cases will always set forth the criteria for identifying those cases. If the fact that the criteria are established by federal law were itself sufficient to establish a federal question for purposes of Article III, then Article III's limitation would be meaningless. The relevant question is whether the class of cases itself satisfies Article III (i.e., whether the cases raise substantive questions of federal law), not whether the criteria for identifying those cases are set forth in a federal statute. See *Mesa*, *supra* (threshold determination of whether the official is

Article III jurisdiction could be sustained, even under the United States' reading of the statute, if the Court ratifies a broad reading of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1924). As this Court recently noted, "*Osborn* . . . reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that *might* call for the application of federal law." *Verlinden*, 461 U.S. at 492 (emphasis added). Here, if the Attorney General's certification decision is sustained, then the case will call for the application of federal law (i.e., it will be a suit against the United States under the FTCA). Thus, all cases in which certification has occurred "might" end up calling for the application of federal law because the certification "might" be upheld.

But this Court has twice declined to reaffirm the sweeping language of *Osborn*. See *Verlinden*, 461 U.S. at 492; *Mesa v. California*, 489 U.S. at 137. It would have to do so here, if it adopts the United States' reading of the statute. For, even though there *might* be a federal question in every certification case, in those cases removed from state court in which the district court rejects the Attorney General's certification, the underlying case or controversy will not, in fact, call for any application of federal law. And that fact will be clear, at the outset of the case, once the threshold issue of the propriety of the substitution is resolved.<sup>17</sup>

acting "under color of office" not sufficient to establish jurisdiction in those cases in which official does not raise a federal defense).

<sup>17</sup> Once subject matter jurisdiction is properly established in federal court, that jurisdiction is not defeated by subsequent events. For example, if the plaintiff and defendant are diverse at the outset of the case, the fact that the plaintiff moves into the defendant's state after the case is commenced does not defeat jurisdiction. *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957).

One could argue that, when a case is removed to federal court pursuant to 28 U.S.C. § 2679(d)(2), the United States is at least conditionally substituted as a party and that jurisdiction, having

Moreover, even if the statute, as interpreted by the United States, could scrape by under Article III—even if the Court decides that the Attorney General's certification alone (invalid though it may be) provides "substance sufficient to confer subject matter jurisdiction on the court," *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)—there is no reason to believe that Congress wanted to push the constitutional envelope so far. Ordinarily, pendent jurisdiction is discretionary for a federal court, and the discretion is exercised hesitantly. See *id.* at 726 ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").<sup>18</sup> It would be unprecedented for Congress to

"vest[ed]" at that time, "cannot be ousted by" the district court's subsequent overturning of the certification and resubstitution of the original defendant. *Ibid.* (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 546, 547 (1824)). The problem with that argument is that, if the certification decision is reviewable, it makes very little sense to think of the United States as having been substituted as defendant until the district court upholds the certification. If, in *Smith v. Sperling*, the Court had determined that the parties had not been diverse even at the outset, the case would have been dismissed. Jurisdiction would never have vested. Here, too, if substitution is denied because the certification is invalid, then jurisdiction was never properly established in the first place.

The situation is analogous to a removal under 28 U.S.C. § 1442 (a)(1) in which the district court determines that no federal defense is presented and must, therefore, remand the case to state court. The mere allegation that the defendant employee was acting "under color of federal law" is not sufficient to establish jurisdiction for Article III purposes. So too, here, the mere allegation that the defendant employee was acting "within the scope of his employment" is not sufficient to establish Article III jurisdiction unless certification is treated as conclusive. As long as certification is reviewable, the United States is not substituted as defendant, and the jurisdiction of the court does not vest, until the court itself determines scope of employment.

<sup>18</sup> Even the analogy with pendent jurisdiction is a weak one, since under Section 2679(d)(2) there are not two claims, one federal and one state, with the former falling by the wayside, and the latter

compel a district court to retain jurisdiction over a purely state law case, simply because, at the outset of the case, the validity of the Attorney General's certification had to be determined.

Under a natural reading of the statute, by contrast, no Article III difficulties are raised. "An action against a federal employee who has been certified as acting in the scope of her employment must proceed *exclusively* against the United States under the FTCA." *Mitchell v. Carlson*, 896 F.2d 128, 134 (5th Cir. 1990). In that instance, subject matter jurisdiction is clear—the case becomes "a claim under the FTCA." *Id.* at 136. It is only if, contrary to the plain language, certification is not conclusive for purposes of substitution, that an Article III problem arises.

Some courts have tried to escape this Article III problem by holding that the Attorney General's certification is not even conclusive for purposes of federal court jurisdiction. See, e.g., *Nasuti v. Scannell*, 906 F.2d at 808. This approach flies straight in the face of Section 2679(d)(2), which states that certification "shall conclusively establish scope of office or employment for purposes of removal." If certification is "conclusive" only until a federal court disagrees, then words have lost all meaning.

In *Nasuti*, the court tried to finesse the language of the statute by distinguishing between removal and remand. "While Congress provided that the Attorney General's certification conclusively establishes scope of employment for *removal* purposes," the Court explained (*id.* at 813), "that conclusive effect lasts only until the court speaks on the specific scope issue," in which case, if it finds the certification improper, it will remand the case to state court. Under the First Circuit's view, the only point of the "conclusive" language of Section 2679(d)(2) is to ensure

surviving. There is only one claim, and (under the United States' reading of the statute) the district court has to determine at the outset: is it a federal claim or only a state one? For the Court to decide the latter and yet be compelled to retain the case bears no resemblance to any statutory scheme with which we are familiar.

that "the federal defendant's scope status is resolved by a federal, not a state tribunal." *Ibid. Accord, S.J. & W. Ranch, Inc.*, 913 F.2d at 1544.

But any such "construction—distinguishing removal from remand—is," as the D.C. Circuit has noted, "quite unconvincing." *Kimbrow v. Velten*, 30 F.3d at 1510 n.6. Federal courts always provide the forum to determine their own jurisdiction. Every removal petition is "conclusive" in the sense that it guarantees that the choice of forum "is resolved by a federal, not a state tribunal" (*Nasuti v. Scannell*, 906 F.2d at 813). See 28 U.S.C. § 1446 (permitting defendant in state court suit to file removal petition in federal district court and requiring district court to determine propriety of removal petition). Federal courts always provide the forum for determining the propriety of removal. Congress must, therefore, have meant more than that by stating that certification will "conclusively" establish scope of employment for purposes of removal. What Congress must have meant is what the words plainly state: that the certification is non-reviewable; that the case, once removed, cannot be remanded to state court.

At the very least, therefore, it is clear (as the United States concedes) that "certification" conclusively establishes a federal forum for the entire case. This Court, then, cannot escape the Article III issue if it accepts the United States' position that certification is not conclusive for purposes of substitution.

In *Mesa*, this Court declined to adopt a perfectly plausible reading of a statute urged by the United States because it raised serious Article III questions. *Mesa* at 137 (citing *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979) ("[I]f 'a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided,' *Crowell v. Benson*, 285 U.S. 22, 62 (1932), a court should adopt that construction")). Certainly, then, the Court should decline the United States' invitation here unnecessarily to distort the language of the statute, to

twist its structure, to ignore its history and its underlying policies, and to trample on basic principles of agency law, all in order to reach a result that itself raises serious constitutional concerns.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL K. KELLOGG  
(*Amicus Curiae*, invited by Court,  
per order of November 15, 1994)  
KELLOGG, HUBER, HANSEN & TODD  
1300 I Street, N.W.  
Suite 500 East  
Washington, D.C. 20005  
(202) 326-7902

January 27, 1995

## **APPENDIX**

## APPENDIX

75 STAT 539

PUBLIC LAW 87-258-SEPT. 21, 1961

Public Law 87-258

## AN ACT

To amend title 28, entitled "Judiciary and Judicial Procedure", of the United States Code to provide for the defense of suits against Federal employees arising out of their operation of motor vehicles in the scope of their employment, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 2679 of title 28, United States Code, is amended (1) by inserting the subsection symbol "(a)" at the beginning thereof and (2) by adding immediately following such subsection (a) as hereby so designated, four new subsections as follows:

"(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

"(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to

whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

“(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

“(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.”

SEC. 2. The amendments made by this Act shall be deemed to be in effect six months after the enactment hereof but any rights or liabilities then existing shall not be affected.

Approved September 21, 1961.